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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 77-452

MOBIL ALASKA PIPELINE COMPANY, *Petitioner,*

- against -

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 29, 1977.

OPINIONS BELOW

The opinion of a divided panel of the United States Court of Appeals for the Fifth Circuit, Nos. 77-2392, 77-2412, 77-2421, 77-2437 (July 29, 1977), not yet reported, is set forth in the appendix. App. A. Also set forth in the appendix is an order of the Interstate Commerce Commission, Investigation and Suspension Docket No. 9164 (June 28, 1977). App. C.

JURISDICTION

The judgment of the Court of Appeals, dismissing a petition for review of an order of the Interstate Commerce Commission, was entered on July 29, 1977. App. B. A petition for rehearing, timely filed by another party in that proceeding, was denied on September 8, 1977. App. E. This petition for a writ of certiorari was filed within 90 days of the date of entry of judgment. The Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

QUESTIONS PRESENTED

This case raises the question whether the investors who constructed the Trans-Alaska Pipeline, or any other investors who carry out a similar project, duly authorized by Congress, are entitled to have the fairness of the rates which they have adopted for interstate transportation on their pipeline determined by the Interstate Commerce Commission after full hearing, on the record, with an opportunity for judicial review; or whether, by coercive use of its statutory power to suspend tariff rates for seven months, the Commission may bypass the procedural safeguards described above, summarily condemn the rates adopted by the carriers, and dictate lesser rates to be charged on such a pipeline during its first seven months of operation, without opportunity for judicial review of the adequacy of such interim rates.

If the Commission may fix "interim rates" in the manner described, as it has done in this case, then it has an effective discretionary power to impose irreparable loss on pipeline carriers without opportunity for judicial review. If the Commission's rates are ultimately found to be too low, shippers benefiting from those rates cannot be required to pay the balance of the fair cost of transportation. And this Court has indicated that, under the regulatory scheme adopted by Congress, losses incurred during the period of a lawful suspension cannot be passed along to subsequent users of a regulated service.[1] Thus, the questions presented concern the fundamental protections which are available when private investment is devoted to public transportation and other regulated services.

1. Is the Interstate Commerce Commission authorized to suspend the operation of the original tariff schedules of a pipeline, where the effect of such suspension is to leave the pipeline without any schedules and to forbid it to operate while the suspension continues?
2. Is suspension of a pipeline's original tariff, which will result in irretrievable revenue loss to the pipeline, permissible under the Interstate Commerce Act and the Constitution where such suspension is not necessary to avoid potential loss to shippers, consumers or to persons who have protested the pipeline's tariff?
3. If the Interstate Commerce Commission does possess the power to suspend such original schedules, may it exercise such power in order to compel the carrier to provide service during the suspension period at lesser rates summarily fixed by the Commission?
4. If the Interstate Commerce Commission may suspend such original schedules and if it may do so in order to compel adoption of interim rates fixed by itself, may it fix such interim rates without a "full hearing" as required by 49 U.S.C. § 15(1) and without creation of a record

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[1] *See Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152 (1962).

which would permit judicial review of their adequacy under the standards of the Interstate Commerce Act and the Constitution?

5. Does the Interstate Commerce Commission have, as a valid corollary of its power to suspend rates, the power to impose special refund and accounting obligations with respect to collections made pursuant to original or to "interim" tariffs?

STATUTORY PROVISIONS INVOLVED

This case concerns Part I of the Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976), as amended, notably by the Hepburn Act of 1906, ch. 3591, 34 Stat. 584, and the Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539. The relevant provisions thereof, found in Sections 1(1), 1(3), 1(5), 6(1), 6(3), 6(7), 8, 15(1) and 15(7), are set forth in the Statutory Appendix, *infra,* together with relevant provisions of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1655 (1976).

STATEMENT OF THE CASE

This case raises the question whether the Interstate Commerce Commission ("Commission") can use its power to suspend tariffs containing "new" rates (49 U.S.C. § 15(7)) in order to compel operation of the Trans-Alaska Pipeline System ("TAPS") during the statutory seven-month suspension period at interim rates dictated by the Commission. Petitioner Mobil Alaska Pipeline Company is one of eight companies which recently completed construction of TAPS at a cost of over $9 billion. *See* App. C-19. The pipeline's purpose is to transport crude oil from Alaska's North Slope southward some eight hundred miles across

arctic terrain to the TAPS marine terminal at Valdez, Alaska. From Valdez the oil is shipped to refineries in California, Washington and elsewhere in the lower 48 states. TAPS was specially authorized by Congress in the Trans-Alaska Pipeline Authorization Act, in which Congress declared that "[t]he earliest possible construction of a trans-Alaska oil pipeline . . . will best serve the national interest." 43 U.S.C. § 1651(c) (1976).

Under the form of ownership which the TAPS owners have adopted, each has an undivided interest in the pipeline and each separately undertakes to use its share of pipeline capacity to transport crude oil.[2] Although affiliates of all but one TAPS carrier are engaged in the production of oil on the North Slope, the percentage ownership of the pipeline varies from the affiliates' percentage ownership of oil production.[3] Each carrier recognizes its obligation to transport not only oil tendered by its affiliate but all oil that may be offered for shipment, without discrimination, and at a fair and reasonable cost consistent with the carriers' statutory right to a fair return on investment. 49 U.S.C. §§ 1(5), 15a.

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[2] The eight carriers share ownership in TAPS as follows:

Mobil Alaska Pipeline Co.	5%
Sohio Pipe Line Co.	33.34%
Arco Pipe Line Co.	21%
Exxon Pipeline Co.	20%
BP Pipelines Inc.	15.84%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

[3] For example, petitioner's parent, Mobil Oil Corp., owns only 2% of the oil being produced on the North Slope, while petitioner owns 5% of TAPS. Even if petitioner is tendered all its parent's oil for transportation, this would supply only 40% of its TAPS capacity. Union Alaska Pipeline Co.'s affiliates own no Alaskan oil.

Accordingly, as TAPS construction neared completion each carrier independently calculated and adopted a schedule of rates. On June 10, 1977, Mobil Alaska filed its tariff with the Interstate Commerce Commission pursuant to section 6(1) of the Interstate Commerce Act and 49 C.F.R. § 1300.57 (1976), to become effective on June 20, later postponed to June 30, 1977.

PROCEEDINGS BEFORE THE COMMISSION

On June 13, 1977, the Commission issued notice of a summary proceeding, pursuant to 49 U.S.C. § 15(7), to consider suspension of the tariffs of Mobil Alaska and the six other TAPS owners who had filed their tariffs.[4] The notice indicated that, contrary to the normal procedure established by Commission rule, this suspension proceeding would bypass the Commission's staff suspension board and its appellate division of three Commissioners and would instead be presented directly to the entire Commission. App. G-1.

On June 15 four parties—the State of Alaska, the Arctic Slope Regional Corporation ("ASRC"), the Department of Justice by its Antitrust Division, and the Bureau of Investigations and Enforcement of the Interstate Commerce Commission—filed protests challenging all TAPS tariffs as too high.

Because of its financial interest in Arctic Slope oil, Alaska sought to minimize the cost of transporting that oil to Valdez.[5] ASRC, representing Alaskan native

[4] Phillips Alaska Pipeline Corp. filed its original rates after the summary proceeding here at issue was commenced.

[5] Alaska sold the Arctic Slope oil leases to the producing companies for $900 million in 1969, and retained a royalty right to 12½% of the oil production, payable in kind or cash based on the value of the oil at the wellhead. Since the price of the oil, as delivered at refineries in the lower 48 states, is fixed in relation to world oil prices, the value at the wellhead is in inverse relation to the cost of pipeline transport. Alaska also imposes a "severance tax" which is measured as a percentage of value at the wellhead. *See* App. A-4.

groups, also asserted a financial interest in the oil, through statutory entitlement to recover 2% of Alaska's royalty interest, but subject to a ceiling of $500 million.[6] The Antitrust Division contended that the carriers' rates were excessive and would discourage independent oil companies from developing Arctic slope leases in competition with the carriers' affiliates. Consumer interests did not protest the tariffs, as the price of crude oil delivered at the refinery is not affected by the cost of pipeline transport.

In addition to requesting a formal investigation of TAPS tariff rates, all four protestants urged the Commission to suspend the original TAPS tariffs and establish "interim" rates at a much lower level, at which the carrier would be permitted to operate during the seven-month suspension period. The Commission's Bureau of Investigations and Enforcement asserted that once such interim rates were fixed in a suspension order the carriers must adopt and file them or else face prosecution for failure to perform their duties as common carriers. App. I. The Antitrust Division warned the carriers that failure to acquiesce in a Commission order fixing interim rates would prompt consideration of action pursuant to the Sherman Act. App. H.

[6] Although ASRC is to receive the full cash amount in any case, it expects to receive full payment somewhat sooner if TAPS tariffs are minimized.

Although the carriers had an opportunity to participate in oral argument, the Commission took no evidence. The carriers sought to explain and justify their tariffs in summary fashion but also contended that the suspension of original rates and the fixing of "interim" rates were illegal under the Act. 49 U.S.C. §§ 15(1), 15(7).

Rejecting these arguments, the Commission entered an order on June 28 in which it: (1) suspended the TAPS tariffs as filed by Mobil Alaska and six other TAPS owners for the maximum seven-month period specified in 49 U.S.C. § 15(7);[7] (2) instituted a formal adjudicatory investigation into the lawfulness of the rates in the suspended tariff schedules pursuant to 49 U.S.C. § 15(1); (3) authorized the TAPS owners to refile, on one day's notice, "interim rates" at lower levels fixed in the order; and (4) conditioned the effectiveness of both the original tariffs and the prescribed "interim" tariffs on the carriers' undertaking to make refunds to shippers in the event that the Commission ultimately determined that the interim rates or original rates (which would go into effect if the investigation had not been completed before the expiration of the suspension period) were too high. The Commission acknowledged that under the statutory scheme "the carriers may have no means of obtaining restitution" if the Commission should ultimately determine that it had fixed the interim rates too low. App. C-7. The Commission also acknowledged that if it allowed the carriers' original rates to go into effect and later adjudged them excessive, the carriers would be required to refund any excess previously collected. App. C-7, C-5.[8] Nonetheless, the Commission concluded that suspension was justified on the ground that protestants had made "a showing o[f] probable unlawfulness." The Commission stated, however, that suspension "without allowing interim rates" would be "contrary to the interests of all concerned" (App. C-7) and that "the power to allow interim rates is inherent in the suspension power." App. C-6. The interim rate prescribed for petitioner Mobil Alaska was 23% less than its original rate.[9]

The Commission calculated its interim rates "for the most part" with cost data informally supplied by the carriers, which it used to arrive at a "staff estimate" of the value of each carrier's interest in the pipeline. *See* App. C-17, C-24. Using an assumed throughput of 1.2 million barrels per day, the Commission fixed each

[7] The tariff of Phillips Alaska Pipeline Corp., the eighth owner, was filed later and was also suspended.

[8] Liability to pay reparations equal to the "full amount of damages" caused by the carrier's previous exaction of an excessive rate, together with interest (*Louisville & N.R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925)), would arise under 49 U.S.C. § 8. Reasonable attorney's fees may also be charged in connection with such reparations. *Interstate Commerce Comm'n* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966).

[9] A comparison of the carriers' original rates and the Commission's interim rates is set forth below.

	TAPS Co. Rates	"Interim" Rates	Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59
Arco Pipeline Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corp.	6.22	4.87	1.35
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

carrier's tariff at a figure which it estimated would yield an annual revenue, before deduction of interest, equal to 10% of the estimated valuation. App. C-10, C-11.

Without stating reasons or considering the evidence that might have been offered at an evidentiary hearing, the Commission concluded that its interim rates would provide a return on equity sufficient to attract capital under the standard of *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). App. C-11, C-12.

PROCEEDINGS IN THE COURT OF APPEALS

Pursuant to 28 U.S.C. §§ 2321(a) and 2342(5) (1976), petitioner Mobil Alaska, subsequently joined by the other carriers, invoked the jurisdiction of the Court of Appeals to review and reverse the order of the Interstate Commerce Commission, on the ground that the Commission had exceeded its authority and that its order would cause irreparable injury. Petitioner also sought injunctive relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a). Venue was properly laid in the Fifth Circuit, as Mobil Alaska's principal office is at Dallas, Texas. 28 U.S.C. § 2343.

In a decision rendered at about the same time as the first oil reached Valdez, a divided panel of the Court of Appeals dismissed petitioner's case. Declaring that the language of 49 U.S.C. § 15(7), had no "plain meaning," the majority concluded that the Commission was empowered to suspend an original tariff, and that such a decision was not reviewable under the statute. App. A-10—A-12. The majority appeared to agree that the Commission had no power to fix interim rates, but

held that the Commission had not in fact done so; it had merely "partially waive[d]" its discretionary power to suspend, giving the carrier a choice of operating on the Commission's terms or not at all. App. A-13. *See* 49 U.S.C. § 6(7). Acknowledging that constitutional standards might require that, in some cases, a court should review the action of the Commission in fixing a maximum interim rate, the majority stated that a record which would permit such review was lacking in the present case. App. A-16. The majority acknowledged that TAPS losses would be "irretrievable" and that the carriers estimated these losses at $340 million. App. A-9.

In dissent, Circuit Judge Roney argued that in fixing a maximum interim rate the Commission had exceeded its power to suspend a tariff. He was prepared to assume, without deciding, that the Commission could suspend a pipeline carrier's original tariff, but would have held such suspension reviewable where the absence of pre-existing rates left the carrier without any tariff. App. A-18. In his view, however, if the Commission did seek to fix interim rates, it was required to do so in accordance with procedural standards and upon a hearing record which afforded a basis for judicial review. App. A-19. He also concluded that "the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative risks of equity capital," and that it was "arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor." App. A-25.

Following the decision of the Court of Appeals petitioner was compelled, in order to limit its losses, to file on August 3, 1977, an interim tariff as fixed by

the Commission. Petitioner is now operating at that interim rate and is incurring substantial revenue losses day by day measured by the difference between its original rate (whose legality the Commission is now adjudicating under the procedures of the Hepburn Act), and the interim rate. The Commission's order acknowledges that on January 29, 1978 the original tariff will take effect unless the Commission has previously completed its review and found that tariff to be unlawful. App. C-14.[10]

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The purpose of the suspension power is to permit the Commission to preserve the status quo—to maintain transportation services at existing rates and levels —while it investigates the legality of a proposed change. Never before has the Commission sought to utilize the suspension power in order to compel a pipeline either to stand idle or to commence operations on terms summarily dictated by the Commission. The Commission has purported to exercise an arbitrary power which it previously has held it is "without jurisdiction" to exercise under the Mann-Elkins Act.[11] The notion that the Commission may fix interim rates without fair hearing and without effective opportunity for

[10] A motion to extend the suspension period beyond the seven months specified in the statute and the Commission order is pending before the Commission.

[11] *See Restriction In Routing Between Greenwood and Augusta*, 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line R.R.* v. *United States*, 48 F.2d 239, 245 (W.D.S.C. 1931), *aff'd*, 284 U.S. 288 (1932).

judicial review is inconsistent with essential principles of private property and due process of law. The decision of the Court of Appeals introduces a novel element of unfairness into the regulatory scheme established by Congress, and can only make it more difficult to find other sources of private capital in the United States willing to undertake further projects of public transportation.

The decision of the Court of Appeals raises important questions which have not been, but should be, settled by this Court. *United States* v. *Students Challenging Regulatory Agency Procedures,* 412 U.S. 669 (1973) (*"SCRAP I"*), left unresolved the recurrent question whether a rate suspension order is entirely immune from review. *Id.* at 698 n. 22. Subsequently, this Court suggested that, as a corollary to the suspension power, the Commission might give the carrier a choice between suspension of a tariff increase and acceptance of such increase with conditions "tailored far more precisely to the particular circumstances presented." *United States* v. *Chesapeake & Ohio Railroad,* 426 U.S. 500, 514 (1976) (*"Chessie"*). But the limits of this corollary power were not defined. And the Commission has gone far beyond the rule of the *Chessie* case in its summary establishment of an interim rate, in a manner which contravenes the requirement of "full hearing" for rate making under the Hepburn Act. *See, e.g., Morgan* v. *United States,* 298 U.S. 468 (1936); *Interstate Commerce Commission* v. *Louisville & Nashville Railroad,* 227 U.S. 88 (1913). The Fifth Circuit's decision in this case also conflicts with a decision of the Court of Appeals for the District of Columbia Circuit, which held that a regulatory commission may not use the suspension power to coerce

establishment of rates by a carrier in a manner which frustrates the statutory procedures for rate making. *See Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970). Resolution of the questions raised in this case is important to common carriers subject to Part I of the Interstate Commerce Act, and also to the industries subject to regulation under other legislation modeled on Part I of the Interstate Commerce Act.[12]

II. THE COMMISSION HAS ABUSED THE SUSPENSION POWER BY EXERCISING IT IN A MANNER NOT INTENDED BY CONGRESS

The decision of the Court of Appeals introduces a novel and arbitrary element of unfairness into the general regulatory scheme which has been established by Congress and by the decisions of this Court. Under the Interstate Commerce Act a railroad or pipeline carrier is entitled "to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise." *United States* v. *Illinois Central Railroad,* 263 U.S. 515, 522 (1924). *Accord, Aberdeen & Rockfish Railroad* v. *Students Challenging Regulatory Agency Procedures,* 422 U.S. 289, 311 (1975) (*"SCRAP II"*); *United States* v. *Students Challeng-*

[12] Numerous statutes were modeled upon the rate making and suspension provisions at issue in this case and contain identical or very similar relevant language. *See, e.g.,* Federal Aviation Act, 49 U.S.C. §§ 1482(d) (rate making), 1482(g) (suspension); Federal Power Act, 16 U.S.C. §§ 824d(e) (suspension), 824e(a) (rate making); Natural Gas Act, 15 U.S.C. §§ 717c(e) (suspension), 717d (a) (rate making). Also patterned on these provisions were similar sections of parts II-IV of the Interstate Commerce Act regulating motor carriers, 49 U.S.C. §§ 316(e) (rate making), 316(g) (suspension); water carriers, 49 U.S.C. §§ 907(b) (rate making), 907 (g) (suspension); and freight forwarders, 49 U.S.C. §§ 1006(b) (rate making), 1006(e) (suspension).

ing Regulatory Agency Procedures, 412 U.S. 669, 672 (1973) (*"SCRAP I"*). Under the Hepburn Act,[13] the Commission's power to set rates arises only when rates are examined and determined to be unlawful "after full hearing." When such a determination is made the carrier is liable for reparations equal to the "full amount of damages" caused by the carrier's previous exaction of an excessive rate, 49 U.S.C. § 8, together with interest, *Louisville & Nashville Railroad* v. *Sloss-Sheffield Steel & Iron Co.,* 269 U.S. 217 (1925), and reasonable attorney's fees, *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.,* 383 U.S. 576, 580-81 (1966). The Mann-Elkins Act[14] authorizes the Commission to suspend proposed changes in rates before they become effective and to postpone the effective date of such changes, maintaining the status quo of transportation for up to seven months while the rates are investigated under the procedures of the Hepburn Act. The Mann-Elkins Act does not, however, authorize the Commission to prescribe a rate. It presupposes that when the Commission suspends tariffs containing "new" rates, old rates remain in effect. As Representative Mann explained to a critic of his bill, "when the railroad company then files this schedule of rates proposing to increase the rates, we say it is a reasonable presumption that the rate which has existed, possibly for a long time—but whether for long or short, the one in existence—is a fair rate, and should remain in force until the commission has had an opportunity to give some investigation to the subject. That seems to be fair to the railroad company and fair to the ship-

[13] Section 2 of the Hepburn Act (1906), 34 Stat. 586, as amended, 49 U.S.C. § 15(1).

[14] Section 12 of the Mann-Elkins Act (1910), 36 Stat. 551, as amended, 49 U.S.C. § 15(7).

per." 45 Cong. Rec. 4713 (1910). Moreover, the presumptively lawful pre-existing rate acts as a significant gauge against which the Commission can summarily, but presumably fairly, measure the proposed change in the absence of an evidentiary record.

Just as the suspension power differs from the authority to fix rates under the Hepburn Act, it also differs from the power to fix the terms and conditions upon which a certificate of public convenience and necessity may be granted. While the Commission has been authorized to determine whether to grant such certificates to certain other carriers and reviews original rates in connection with such a grant, *see Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959), carriers by pipeline require no such certificate. The operation of TAPS was authorized by Congress itself and the vast investment in construction of the pipeline was made in reliance upon that authorization and upon the general rule of the Interstate Commerce Act that rates are to be fixed in the first instance by the carrier at a level which ensures a reasonable return on investment, and that Commission intervention in the rate making process is subject to judicial review. *See Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944).

The statutory scheme is disrupted by purported exercise of the suspension power where such exercise leaves the carrier without any tariff and effectively forbids the use of his property except on conditions fixed by the Commission without satisfaction of fundamental procedural requirement. *See* 49 U.S.C. § 6(7). In such circumstances, suspension is inconsistent with the policy of the Mann-Elkins Act, which seeks to pre-

serve existing levels of service pending an investigation of proposed changes.

Summary establishment of interim rates, which must be unrelated to any rates previously adopted by the carrier, necessarily prejudges the essential issue which must be determined after full hearing under the Hepburn Act. If the Commission's summary decision is wrong, as it is in this case, there is no subsequent opportunity to recoup from shippers the balance of the fair cost of transportation. Procedures under the Hepburn Act may lead the Commission to conclude that it has made a mistake in fixing its interim rate, but shippers who have taken advantage of that rate cannot be required to pay the balance of the fair cost of transportation. Nor can losses incurred during a lawful suspension period be recouped from subsequent customers of a regulated service. *See Federal Power Commission* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 152 (1962). The net effect of the decision of the Court of Appeals, therefore, is to alter the regulatory scheme so as to confer on the Commission arbitrary power to inflict irreparable loss on fledgling carriers without opportunity to recoup those losses or to avoid them by judicial review. This is not the regulatory scheme intended by Congress.

A. Congress Did Not Authorize The Commission To Suspend A Carrier's Original Rates

The statutory language of section 15(7) limits its application to "any schedule stating a new . . . rate . . . , or any new . . . classification, or any new . . . regulation or practice affecting any rate," all subsequently referred to in the section as "the proposed change." The Commission and the court below ignored the "proposed change" language of section 15(7) and focused

instead on the statute's reference to "any schedule stating a new . . . rate," interpreting the modifier "new" to encompass all tariffs not previously in effect.

The reference to "new" rates in the Mann-Elkins Act of 1910, *see* 49 U.S.C. § 15(7), was apparently derived from the term "new schedules" used in the Hepburn Act of 1906, *see* 49 U.S.C. § 6(3). The legislative history of both sections 6(3) and 15(7) indicates that they were intended to be coextensive and that the tariffs that could be suspended under the 1910 Act were intended to be the same as the changed tariffs that the Hepburn Act required to be filed under section 6(3). Original tariffs are not filed under section 6(3), but under section 6(1) of the Act.[15]

As it stood after amendment by the Hepburn Act of 1906, the Interstate Commerce Act contemplated two sorts of filings: the general filing of all tariffs under section 6(1) and the filing of changed tariffs under section 6(3). The drafters of the Mann-Elkins Act of 1910 linked the suspension power to the category of changed tariffs which had recently been established by passage of section 6(3). Thus, President Taft, who proposed enactment of the legislation, pointed out that despite the notice provision of section 6(3) the Commission could not commence investigation of "an increase in rates until after it shall have become effective." H.R. Rep. No. 923, 61st Cong., 2d Sess. 3 (1910). Accordingly, the President advocated legislation to permit commencement of such investigations before the proposed change took effect,

[15] Petitioner became a common carrier subject to the Commission's jurisdiction only upon filing its original tariff pursuant to § 6(1) and commencing crude transportation operations. 49 U.S.C. §§ 1(1), (3).

and also to give the Commission discretion to postpone the new schedule's effective date in order to allow maintenance of service at existing rates while the investigation proceeded. The wording of the first sentence of section 15(7) ("any schedule stating a new . . . rate") remains as proposed by the Taft administration and enacted in 1910. Discussion and report of the language as enacted repeat the theme that the suspension power applied only to the changes subject to section 6(3).[16]

The Commission itself had never previously decided the precise question whether it might suspend a Part I carrier's original rates, filed pursuant to section 6(1) of the Act, but it indicated in a 1930 decision that it was "without jurisdiction" to suspend even an established carrier's original tariff for service on a railway extension not previously served by that carrier. *Restriction In Routing Between Greenwood and Augusta,* 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line Railroad* v. *United States,* 48 F.2d 239, 245 (W.D.S.C. 1931), *aff'd,* 284 U.S. 288 (1932). In 1912 the Commission had reached a similar result, stating that the tariff in question "was the first and only tariff . . . on file here, and an order suspending its operation would have left the wharf company without any lawful rates and would therefore have obliged it either to cease its operation or to handle the traffic of the port in violation of the Act." *In re Wharfage Charges of the Galveston Wharf Co.,* 23 I.C.C. 535, 537 (1912).[17] Commis-

[16] *See, e.g.,* 45 Cong. Rec. 6777, 6778, 6893 (1910) (remarks by Senators Cummins and LaFollette). The Senate Committee majority referred to the rates to be suspended as any "proposed increase in rates, or change in classification." S. Rep. No. 355, 61st Cong., 2d Sess. 9 (1910). The minority described the suspension power as "the power to suspend changes in rates pending a hearing upon the propriety of the change." *Id.* minority statement at 9.

[17] For purposes of another provision of § 15(7), the Commission

sion regulations interpreting suspension pursuant to section 15(7) presuppose the existence of an "old" rate. For example, upon suspension of an entire pipeline or railroad tariff "the previous tariff and effective supplements are continued in effect and remain in effect during the period of suspension." 49 C.F.R. § 1300.9(k)(5) (1976). *See generally* 49 C.F.R. Part 1300 (1976). Similarly, the Federal Power Commission, whose suspension power is defined in terms nearly identical to section 15(7),[18] has held by rule that suspension does not extend to initial rate schedules. 18 C.F.R. §§ 2.4(d), 2.52 (1977).[19]

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has developed a special category of "initial rates," which it uses to refer, not to a carrier's original rates filed under § 6(1), but to rates for new services offered by established carriers and filed under § 6(3). This special category has developed because, as enacted in 1910, § 15(7) placed upon the carrier "the burden of proof to show that the increased rate or proposed increased rate is just and reasonable." 36 Stat. 552. Carriers who could show that the new rate was a decrease or that it concerned a somewhat novel service (an "initial rate") did not have to sustain this burden of proof, although any change in their prior practices might be suspended. *See, e.g., Cotton from New Orleans*, 49 I.C.C. 751 (1918) (carrier changed former practice and filed rate for delivery at a city not previously directly served). In 1940, Congress amended the statute to place on the carrier the burden of justifying any "changed rate," not just increases (Transportation Act of 1940, ch. 722, Title I, § 10(e), 54 Stat. 912), but the Commission has regarded its category of "initial rates" as unaffected by the change. *See, e.g., Rail-Water, Grain in Bulk, Missouri, Illinois and Indiana to Buffalo*, 321 I.C.C. 564 (1963) (carriers with prior individual tariffs filed joint "initial tariff" for new combined service).

[18] Federal Power Act, § 205, 16 U.S.C. § 824d(e); Natural Gas Act, § 4(e), 15 U.S.C. § 717c(e) (1976).

[19] This Court has also appeared to understand the reference to "any schedule stating a new . . . rate . . ." as synonymous with "proposed change[s]." *See SCRAP II*, 422 U.S. at 297; *SCRAP I*, 412 U.S. at 697; *Atchison, T. & S.F.R.Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 820 (1973); *Arrow Trans. Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 665 n.10 (1963).

The Fifth Circuit disregarded the previous practice under this and related statutes and held that the suspension power did extend to original tariffs. It reached that conclusion on the ground that, when Congress subsequently enacted other statutes modeled on section 15(7) of the Interstate Commerce Act, it took care on several occasions to provide that suspension did not apply to any initial rate (*see* Federal Aviation Act, 49 U.S.C. § 1482(g)), or that it did not apply to an initial rate filed prior to a cut off date after which the Commission was empowered to prevent new entry into the business by withholding certificates of public convenience and necessity. App. A-11—A-12.[20] In the view of the Court of Appeals, the fact that subsequent Congresses had resorted to specific language to ensure that original tariffs were not subject to suspension indicated that such tariffs were subject to suspension if previous Congresses had failed to insert a proviso. App. A-12. In reaching that conclusion, however, the Court of Appeals disregarded the intent of the Congress which enacted the Mann-Elkins Act itself. This Court has often observed that "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). *Accord, Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *Fogarty* v. *United States*, 340 U.S. 8, 13-14 (1950).[21]

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[20] The suspension provisions cited by the Fifth Circuit included 49 U.S.C. §§ 316(g) (motor carriers); 907(g), (i) (water carriers); 1006(e) (freight forwarders). A certificate of public convenience and necessity (or a "permit" for freight forwarders) must be obtained as a prerequisite to operation under each of these chapters. 49 U.S.C. §§ 306(a)(1) (motor carriers); 909(a) (water carriers); 1010(a)(1) (freight forwarders).

[21] Another reason advanced below for applying suspension to an

B. The Commission May Suspend A Tariff In Order To Preserve The Status Quo Of Transportation, Not To Compel Operation At A Rate Fixed By Itself

As Circuit Judge Roney observed in dissent, the Commission's order constitutes "rate making." App. A-17. The majority characterized it as "partial waiver" of suspension, but this exalts form over substance in a manner other courts have not tolerated in like circumstances.[22] By prohibiting business operations for seven months except on terms which it dictates, the Commission denies the carrier any real choice and effectively compels operation at rates summarily fixed by itself.[23] *See* 49 U.S.C. § 6(7). By so doing the Commission frustrates the policies of the Hepburn Act, which permits establishment of a rate only after full hearing. And it suspends the carrier's rate, not in order to preserve the status quo pending investigation, but to compel operation at a rate fixed by itself pursuant to summary and unlawful procedures.

The situation is different where the carrier has previously operated at its own rate. There, suspension of

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original TAPS tariff is the need to act in case a patently outrageous tariff is filed. But suspension of an "outrageous" original rate merely means that no shipment can occur. Congress may have felt that shipment at an "outrageous" rate was preferable to blockage of all shipments, particularly since the Hepburn Act held out the promise of full reparation, plus interest and attorneys' fees, once the Commission had held its full hearing and determined that the carrier's rate was indeed excessive.

[22] *E.g., American Tel. & Tel. Co.* v. *Federal Communications Comm'n*, 487 F.2d 865, 874-75 (2d Cir. 1973); *Moss* v. *Civil Aeronautics Bd.*, 430 F.2d 891 (D.C. Cir. 1970).

[23] Indeed, the Commission's Bureau of Investigations and Enforcement and the Antitrust Division made the coercive intent very clear. *See supra* at 7, and App. H, App. I.

an increased rate leaves the carrier free to continue during the suspension period at rates which it formerly found satisfactory. A Commission decision to allow any increase over the pre-existing rate during the suspension period, though questionable under the statute, is not likely to arouse opposition from the carrier.[24] Unlike the decision to allow a partial increase during a suspension period, the establishment of an interim tariff at a rate below that of the carrier's original tariff constitutes a pre-judgment of the essential issue which, under the Hepburn Act, the Commission is to decide only after "full hearing."

Where regulatory agencies have employed the suspension power as a vehicle to prescribe rates in a manner which frustrates the policy of the statute and seeks to escape judicial review, courts have not hesitated to intervene. In *Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970), the court struck down the threatened use of the suspension power to block rates exceeding those "suggested" by the Board. The court did so on the ground that such action constituted economic coercion and prescription of rates, in frustration of the statutory procedures for rate making. Both the Fifth Circuit majority and the Commission purport to distinguish the illegal *Moss* order as having permanent rather than interim effect. App. C-6, A-14. Yet the Commission's order will indeed result in a permanent loss.[25]

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[24] *See Port of New York Authority* v. *United States,* 451 F.2d 783 (2d Cir. 1971).

[25] Judge Roney observed that the amounts at issue were likely to be greater than those typically at issue in "permanent" ICC proceedings. App. A-18. In the proceedings before the court of appeals it was estimated that Mobil Alaska would lose $18 million and that

The recent decision in *United States* v. *Chesapeake & Ohio Railroad,* 426 U.S. 500 (1976) (*"Chessie"*) did not authorize use of the suspension power to dictate rates. Nor did *Chessie* authorize the other conditions which the Commission imposed on the carrier's right to operate during the suspension period.[28] In *Chessie* the Commission authorized refiling of suspended rate increases on condition that the carriers agree to devote the additional revenues to capital improvements and deferred maintenance, precisely the needs which the carriers had themselves advanced to justify their proposed increases. That order was described as "a more measured course . . . an alternative [to suspension] tailored far more precisely to the particular circumstances presented." 426 U.S. at 514.

We believe the Court was influenced in *Chessie* by the fact that carriers were given a choice between two options which the carriers, and not the Commission, had articulated. *Id.* at 515. Neither the interim rates of the June 28 order nor the closing down of TAPS for seven months is a carrier-formulated alternative.

The Commission's course of action here cannot be characterized as a "more measured course." Nor is imposition of an interim rate a "precisely tailored" alternative. It does not protect the carriers, as the *Chessie* decision did, and it constitutes a prejudgment of issues which the Commission is obliged to decide in accordance with the procedures of the Hepburn Act.

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total TAPS losses would exceed $340 million during the suspension period (App. A-18), based on the estimated throughput of 1.2 million barrels per day.

[28] *See* App. A-15—A-16 and question 5 in Questions Presented, *supra* at 4.

C. If The Commission May Fix An Interim Rate, It Must Do So After Fair Hearing And On A Record Which Permits Judicial Review

Unlike the exercise of the suspension power, the establishment of rates has traditionally been subject to judicial review. *See, e.g., Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944). And as one court has noted, "[a] suspension decision which effectively blackmails the carriers into submitting agency-authored rates is functionally indistinguishable from an agency order setting those rates and such orders are, of course, judicially reviewable." *SCRAP* v. *United States,* 346 F. Supp. 189, 197 (D.D.C. 1972), *rev'd on other grounds,* 412 U.S. 669 (1973).

The Hepburn Act, amending section 15 of the Interstate Commerce Act, provides that the Commission may fix rates after full hearing and on the basis of substantial record evidence. A "full hearing" under section 15(1) must afford a right to introduce testimony and to be fully apprised of the evidence submitted or to be considered, and an opportunity to conduct discovery and offer evidence by way of explanation or rebuttal. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad,* 227 U.S. 88, 91, 93 (1913). In addition, there must be evidence adequate to support pertinent and necessary findings of fact. *Morgan* v. *United States,* 298 U.S. 468, 480 (1936). At a minimum the Commission should be required to provide fair and reasonable procedures which result in a reasoned decision of controverted issues upon a record

which permits judicial review. *See Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167-74 (1962); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad,* 294 U.S. 499 (1935).

In the instant case the record before the Commission contained no evidence at all; certainly there was no evidence to support its declaration that an annual 10% gross return on the value of the pipeline investment would be adequate to attract such investment, the test laid down by the Court in *Hope Natural Gas,* 320 U.S. at 603. The carriers had no effective opportunity to show why a greater return was necessary to cover the costs of operation and interest payments and to allow an adequate return commensurate with the risks of the business. Circuit Judge Roney found the Commission's return "more akin to that of corporate bonds than to the speculative risks of equity capital." App. A-25.

The Commission's order rejects the past practice of carriers to obtain a net return, after deduction of interest, equal to a percentage of the pipeline's valuation. Changes in regulatory standards or policies must be explained. *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973); *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194 (1947). Yet without explanation the Commission articulates for the first time a rule which would establish a tariff based on a gross return, without deduction of interest costs. The Commission's order gave no reason for this decision even though oral argument at the suspension hearing centered on this issue.

The refusal of the Fifth Circuit majority to review those portions of the order imposing the interim rate condition appears to conflict with the decision in *United States* v. *Chesapeake & Ohio Railroad,* 426 U.S. 500 (1976), in which this Court remanded the case to allow review of the question whether the conditions there imposed were "arbitrary and capricious." 426 U.S. at 515.

CONCLUSION

In sum, the Court of Appeals' conclusion that the Commission may suspend petitioner's original tariff and establish interim rates without opportunity for judicial review cannot be reconciled with essential principles of regulatory due process under the Interstate Commerce Act. The decision disregards the traditional assurance that a carrier may operate under a rate fixed by itself or fixed by the Commission after full hearing and with right of review. It renders unfair the traditional rule that losses incurred during a suspension period cannot be recouped. The decision undermines the traditional procedural protections which have been afforded private investment in regulated

industries and accordingly warrants review by this Court on writ of certiorari.

Respectfully submitted,

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September 21, 1977

Appendices

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2392

MOBIL ALASKA PIPELINE COMPANY, *Petitioner*,
v.
UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents,
and
SOHIO PIPE LINE COMPANY,
AMERADA HESS PIPELINE CORPORATION,
UNION ALASKA PIPELINE COMPANY, *Intervening Petitioners*,
STATE OF ALASKA, ARCTIC SLOPE
REGIONAL CORPORATION, *Intervening Respondents*.

No. 77-2412

BP PIPELINES, INC., *Petitioner*,
v.
UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Respondents*.

No. 77-2421

EXXON PIPELINE COMPANY, *Petitioner*,
v.
UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Respondents*,
and
UNION ALASKA PIPELINE COMPANY, *Intervening Petitioner*.

No. 77-2437

ARCO PIPE LINE COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents,

STATE OF ALASKA, *Intervening Respondent*.

ON PETITIONS TO REVIEW AN ORDER OF THE
INTERSTATE COMMERCE COMMISSION

July 29, 1977

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges. PER CURIAM:

Four petitions seeking injunctive relief and review of a June 28, 1977 Order of the Interstate Commerce Commission are before us, together with the United States' motion to dismiss.[1] For reasons discussed below, we grant the government's motion.

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[1] No. 77-2392, Petition of Mobil Alaska Pipeline Company (Mobil) to Annul, Set Aside and Enjoin Enforcement of an Order of the Interstate Commerce Commission and Applications and Motions for Temporary Restraining Order and Interlocutory Injunction. The respondents in this case were the United States, the Interstate Commerce Commission (ICC or Commission) and the latter's individual Commissioners. The State of Alaska moved to appear as a party. The Arctic Slope Regional Corporation moved to intervene. Both opposed Mobil's petition. Sohio Pipe Line Company moved to appear as a party in support of Mobil's petition, as did Amerada Hess Pipeline Corporation. Union Alaska Pipeline Company moved to appear as a party.

No. 77-2412, Petition to Enjoin, Set Aside, Suspend and Review Order of the Interstate Commerce Commission and Motion to Stay, Restrain and Suspend Order of the Interstate Commerce Commission filed by BP Pipelines, Inc. (BP), naming the United States and the ICC as respondents.

No. 77-2437, Petition for Review and Application for Interlocutory Injunction filed by Arco Pipe Line Company (Arco). The United States, the ICC and its individual Commissioners were named as respondents. Alaska also sought leave to appear as a party in opposition to Arco's petition.

No. 77-2421, Petition for Review and Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review, filed by Exxon Pipeline Company (Exxon), naming the ICC and the United States as respondents. Union Alaska Pipeline Company moved to appear as a party.

The United States moved for consolidation and to dismiss. The motion for consolidation was granted from the Bench during oral argument on July 19, 1977. The court hereby grants all motions to intervene.

BACKGROUND OF THE CASE

This controversy arose on the eve of the flow of crude oil through the Trans Alaska Pipeline System (TAPS)[2] which stretches from oil fields in Alaska's North Slope at Prudhoe Bay to Valdez, Alaska, some 800 miles distant. The pipeline was constructed by the Alyeska Pipeline Service Corporation, an agent for its eight owners.[3]

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[2] In 1968 massive reservoirs of oil were discovered at Prudhoe Bay. Plans to construct the pipeline were announced in 1970. From its beginning the pipeline has been grist for judicial mills. *See, e.g., Wilderness Society* v. *Morton*, 479 F.2d 842 C.A.D.C., 1975) (en banc); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *rev'g* 495 F.2d 1026 (C.A.D.C., 1974). Indeed, it literally took an act of Congress to prevent further environmental litigation. Trans-Alaska Pipeline Act, 43 U.S.C.A. § 1652(d). Construction was thus delayed until 1974 and took three years.

Oil began to enter the pipeline on June 20, 1977. An explosion and fire at pump station No. 8 on July 8, 1977, resulted in a temporary shutdown. The parties have informed the court that the first oil is expected to reach Valdez around July 26, 1977.

[3] Each of the following companies owns an undivided interest in TAPS:

Between May 27, 1977 and June 15, 1977, seven TAPS owners filed the tariffs [4] which are at issue here,[5] having effective dates ranging from June 20 to July 1, 1977. Protests were filed by the Department of Justice, the State of Alaska,[6] the Arctic Slope Regional Corporation,[7] and the

Company	*Percentage Ownership*
Mobil Alaska Pipeline Co.	5.00%
Sohio Pipe Line Co.	33.34%
ARCO Pipe Line Co.	21.00%
Exxon Pipeline Co.	20.00%
BP Pipelines Inc.	15.84%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

These companies are subject to ICC regulation by virtue of the Interstate Commerce Act, 49 U.S.C.A. § 1(1)(b), which covers common carriers engaged in the transportation of oil by pipeline.

[4] Tariffs must be filed with the ICC pursuant to 49 U.S.C.A. § 6(1).

[5] Because Phillips, the eighth owner, filed its tariff on June 20, 1977 with an effective date of July 20, the time for filing protests had not expired by June 28, the date of the ICC's order. Phillips' tariff was thus not covered by the Order and is not before this Court.

[6] Alaska owns a one-eighth royalty interest in the oil from the Prudhoe Bay fields. In addition, Alaska has an oil production severance tax. Both the value of the royalty oil and the severance tax are tied to the value of the oil at the point of production, *i.e.*, the wellhead value. Alaska contends that the wellhead value is generally determined by the market price *less* the transportation costs. Therefore, as the TAPS carrier rates increase, the value of Alaska's interest decreases.

[7] Prior to the enactment of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.A. §§ 1601-1627, the Inupiat Eskimos held claims of unextinguished aboriginal title to the entire Arctic Slope of the State of Alaska, an area which encompasses Prudhoe Bay and much of the land over which TAPS was constructed. The Arctic Slope Regional Corporation is one of 12 corporations established pursuant to ANCSA to conduct Native Alaskan business for profit. 43 U.S.C.A. § 1606. As compensation for the extinguish-

ment of all aboriginal land claims, ANCSA granted Alaskan Natives fee title to approximately 100 million acres of land. 43 U.S.C.A. §§ 1611, 1613. All future revenues derived from that land will be the property of the Native people. 43 U.S.C.A. § 1606. ANCSA further provided for cash compensation of $962,500,000 to be paid over a period of years, a portion of which is to be derived from a 2% royalty on the wellhead value of all crude oil production in Alaska under state or federal leases. 43 U.S.C.A. §§ 1605, 1608. Thus, on their theory, the Native Alaskans' revenue is inversely related to the rise in TAPS tariffs.

[8] Recognizing the importance of the controversy, the ICC, in an extraordinary move, bypassed its usual procedural channels and took the suspension proceeding for its own direct consideration. While Commission regulations consider a protest and petition to suspend "as addressed to the discretion of the Commission," 49 C.F.R. § 1100.42 (1976), suspension protests and petitions are in practice routinely referred to the Board of Suspension. See 49 C.F.R. § 1100.200 (1976); Mobil Memorandum In Support of Application for Interlocutory and Temporary Restraining Order at 7; Reply of Interstate Commerce Commission in Opposition To Application For Interlocutory Injunction and Temporary Restraining Order at 4. The Commission heard arguments for one full day before issuing its suspension order.

Although a transcript of that hearing was made, the papers on file with the Court contain only excerpts from that proceeding. *E.g.*, Appendix A to Justice Department's Memorandum in Support of Motion to Dismiss; Appendix C to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order. Also, the tariff filings themselves, with any supporting submissions, were not filed with the Court. On file with the Court, however, were several exhibits such as "Reply of Exxon Pipeline Company to Protests" (Appendices of Exxon Pipeline Company for Expedited Consideration or in the Alternative Stay Pending Review) and Statements by C. R. Thompson, Controller-Treasurer of Mobil Alaska Pipeline Co. (Appendix D to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order).

[8a] The briefs of the parties contained references to the infor-

ICC's Bureau of Investigation and Enforcement. The Commission heard oral argument on June 27, 1977 [8] without making any formal evidentiary record.[8a]

The ICC's June 28 Order [9] instituted an investigation into the lawfulness of the tariffs pursuant to 49 U.S.C.A. §§ 15(1)[10] and 15(7).[11] The rates filed were suspended for

mation which the ICC apparently had before it during the suspension proceeding. Such information included: (i) written representations in the form of protests from the State of Alaska, the Arctic Slope Regional Corporation, the United States Department of Justice, and the Bureau of Investigations and Enforcement of the ICC (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 2); (ii) verified statements offered by the TAPS Carriers in support of their rate calculations (Memorandum in Support of Exxon Pipeline Company's Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review at 46) [hereinafter Exxon Memorandum]; (iii) statement of Dr. Michael J. Ileo (submitted with Alaska's protest) which discusses the unreasonableness of carriers' rate calculations (Exxon Memorandum at 46); (iv) sworn testimony of Raymond B. Gary, a Managing Director of Morgan Stanley & Company, and Dr. Ezra Solomon, Dean Witter, Professor of Finance at the Graduate School of Business of Stanford University, filed in Ex Parte No. 308, *Valuation of Common Carrier Pipelines* (Exxon Memorandum at 38); (v) letters sent from Mobil Alaska Company to ICC (obtained under the Freedom of Information Act, 5 U.S.C.A. § 552) which deal with such topics as TAPS start-up, depreciation, dismantling and restoration, anticipated salvage, and estimated annual operating expenses (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 25-6); (vi) calculation of the rates of return on valuation for 90 regulated pipelines for the years 1970-72, made by George M. Stafford, former ICC Chairman (Exxon Memorandum at 40-1); and (vii) a variety of carrier-provided data concerning the normal traffic volume for the beginning years of TAPS, costs, depreciation charges, and investment calculations (ICC June 28 Order at 5-7 and Appendices to Order).

[9] The Order is set forth as an Appendix to this opinion.

[10] 15 U.S.C.A. § 15(1) reads in pertinent part as follows:

> "Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending

seven months without prejudice to the filing of interim rates during the suspension period. The Commission addi-

> complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title . . . is or will be unjust or unreasonable . . . the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged . . . and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be . . . ."

[11] 15 U.S.C.A. § 15(7):

> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes

tionally authorized the filing, upon not less than one day's notice, of interim rates which were not to exceed certain levels, subject, however, to the condition that the carriers keep account and that (i) the interim tariffs contain a refund provision to the effect that if the new rates exceed those subsequently authorized or prescribed by the ICC, the carriers will refund the excess with interest; and (ii) the carriers file a similar refund provision applicable to the original proposed rates. The Order thus had the following effect on the carriers' proposed rates per barrel:

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into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. . . ."

	As Filed by TAPS Owners	Authorized By Order [12]	Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59
Arco Pipe Line Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corp.	6.22	Not Yet Acted Upon	
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

The carriers estimate that the Order will result in an irretrievable $340 million loss over the seven-month suspension period.

The suspension left the pipeline companies without tariffs on file, and they are forbidden by § 6(7) of the Act to engage or participate in the transportation of oil unless they file new tariffs. The carriers thus had two alternatives open to them. They could file new tariffs within the ICC guidelines or they could shut down the TAPS system for the seven-month suspension period. Unhappy with either choice, the pipeline companies filed their petitions and motions and the United States moved to dismiss.[13] This Court heard oral argument on July 19, 1977.

The major issues raised by the parties are (i) whether we have jurisdiction to review the ICC order; (ii) whether the Commission has the authority under 49 U.S.C.A. § 15(7)

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[12] According to the ICC, these rates reflect a 10% rate of return on tentative valuation. See pp. 4-8 of the ICC Order, and Appendices 2-5 thereto.

[13] *See* note 1, supra.

to suspend the first and only ("initial") rate of a carrier; (iii) whether as part of a purported suspension order the ICC may prescribe or suggest optional maximum interim rates; (iv) whether the ICC's order authorizing the filing of maximum interim rates without a full hearing amounted to a prescription of rates within the meaning of 49 U.S.C.A. § 15(1); (v) whether the Commission acted outside its statutory authority in ordering the refund provisions in the tariffs; (vi) whether the Commission's action was arbitrary, capricious or constituted an abuse of discretion; (vii) whether the maximum interim rates authorized were confiscatory in violation of the Fifth Amendment.

1. *Reviewability and the authority of the Commission*

The government has moved to dismiss the petitions for review on the ground that this court has no jurisdiction to review suspension orders of the ICC issued pursuant to 49 U.S.C.A. § 15(7). True, courts do not have jurisdiction to review ICC suspension orders. Congress has committed the decision to suspend or not to suspend proposed rates exclusively to the discretion of the Commission. *U.S.* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 37 L.Ed.2d 254 (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 10 L.Ed.2d 52 (1963); K. Davis, ADMINISTRATIVE LAW TREATISE 966 (1970 Supp.). As a panel of this circuit noted:

> The Interstate Commerce Commission . . . is vested with power to suspend, at its discretion, for a period of seven months, rates filed with it pending hearing and decision on their lawfulness. 49 U.S.C. § 15(7). The existence of this power in the ICC, it has been held, evinces the deliberate decision of Congress to extinguish judicial power to grant any injunction which interferes with the Commission's discretionary decision to suspend rates filed with it at anytime before the Commission finally determines the lawfulness of the rates.

Texas v. *Seatrain International*, 518 F.2d 175 at 178 (CA5, 1975). But the rule of unreviewability presupposes an affirmative answer to a preliminary inquiry into whether the Commission has acted within the authority granted to it by § 15(7). A suit to enjoin a suspension order may be entertained if the complaint shows that the agency lacked the basic statutory authority to issue such an order. *Great Western Packers Express, Inc.* v. *U.S.*, 246 F.Supp. 151, 154 (D.Colo.,1965) (three-judge court); *Long Island Railroad Co.* v. *U.S.*, 193 F.Supp. 795, 800 (E.D.N.Y.,1961) (three-judge court).

Section 15(7) gives the ICC the power to suspend "any schedule stating a new individual or joint rate fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate fare or charge" for a period not to exceed seven months, and to order an investigation and full hearings on those new charges. The above language has no plain meaning. The term "new" can refer to both changed and initial rates or only to changed rates. The statutory history of the Mann-Elkins Act (1910), which added § 15(7) to the Interstate Commerce Act, yields little insight on whether the ICC is empowered to suspend initial rates since no one seems to have debated or even discussed this specific question. However, our examination of statutes modeled on § 15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates.

Section 15(7) has served as the prototype of other agency rate suspension provisions in the Interstate Commerce Act and in other regulatory acts as well. In many of these acts, when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language. In the Interstate Commerce Act itself, there are provisions modeled on 49 U.S.C.A. § 15(7) giving the ICC authority

to suspend new rates, proposed by motor carriers, 49 U.S.C.A. § 316(g), by water carriers, 49 U.S.C.A. § 907(g)(i), and by freight forwarders, 49 U.S.C.A. § 1006(e). Each of these provisions contains a grandfather clause exempting certain initial rates from suspension. If initial rates were not covered there would have been no need for the grandfather clauses. Another example is 49 U.S.C.A. § 1482(g), which gives the Civil Aeronautics Board suspension powers similar to those granted to the ICC with one significant difference: it specifically provides that "[t]his subsection shall not apply to any initial tariff filed by any air carrier." Thus, we conclude that if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have done so specifically, and that Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's § 15(7) suspension powers.

The conclusion that initial rates are covered by § 15(7) is consistent with the legislative policy underlying that section. Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

2. *The suggested interim rates*

The petitioners challenge the action of the Commission with respect to suggested interim rates. They point out that § 15(7) contains no provisions for establishing interim rates and that, in any event, rates can only be prescribed after full hearings. See 49 U.S.C.A. § 15(1). The Commission's position is that it has not actually fixed a rate but, in

a situation of urgent national interest and as an incident of its power to suspend, it has given advance indication of the maximum rates with respect to which—if the carriers elect to file them—the Commission will not exercise its power to suspend.

The Commission Order refers to "interim rates," but baldly describing the issue as the power of the Commission to set interim rates is misleading. As we have held, the Commission had the power to unconditionally suspend the proposed tariffs, leaving the carriers without any tariffs but free to file new tariffs if they wished, which would be subject to new exercise of the Commission's power to suspend. The ICC chose not to exercise to its full limits the drastic but available power of unconditional suspension and instead announced that if petitioners would file interim tariffs at or below Commission-announced ceilings the Commission would not unconditionally suspend the tariffs originally filed.

The petitioners maintain that the § 15(7) power to suspend is an all or nothing instrument. We think not. The Commission may elect to exercise its power less than fully, or putting it another way, may partially waive the suspension power. We are guided by the Supreme Court's decision in *U.S.* v. *Chesapeake & Ohio Railroad Co.*, 426 U.S. 500, 49 L.Ed.2d 14 (1976) ("*Chessie*"). In *Chessie* the ICC suspended a carrier-proposed tariff increase but at the same time authorized the railroads to refile, incorporating conditions which would assure that the additional revenue would be expended on capital improvements and deferred maintenance. The Supreme Court upheld the refiling provision as directly related to the ICC's suspension power. The Court noted that the ICC could simply suspend the originally proposed rates for the full statutory seven-month period but that instead "it pursued a more measured course and offered an alternative tailored far more precisely to the particular circumstances presented." 426 U.S. at 514, 49

L.Ed.2d at 23. *Chessie* establishes the right of the ICC to choose to exercise its suspension power to less than its outer limits in order to meet the needs of a particular situation. The ICC's authorization to file interim rates was the type of "more measured course" or partial waiver which the Supreme Court approved in *Chessie*.

Moss v. *CAB*, 430 F.2d 891 (C.A.D.C.,1970), relied on by the petitioners, is not to the contrary. In *Moss* the Court of Appeals for the District of Columbia held that the Civil Aeronautics Board (CAB) could not, after ex parte meetings with the air carriers, "suggest" a comprehensive rate formula that it would not suspend or investigate. *Moss* involved what for all intents and purposes was the establishment of permanent rates. By attempting to establish a permanent rate structure through its suspension power the CAB took actions which went beyond the strongest action it could have taken under its suspension power, i.e., suspending the proposed increases for 180 days. 49 U.S.C.A. § 1482(g). In essence what the CAB attempted to do in *Moss* was to waive a right it did not have. In contrast, the ICC's suggestion of interim rate ceilings in the present case is an action which is more restrained, or measured, than its right to unconditionally suspend the original tariff for a period of seven months. If in seven months the ICC has not completed its investigation, the carriers will be free to levy their originally filed charges subject to a refund order.

Also, in *Moss* the practical effect of the CAB's actions would have been to immunize the suggested permanent rate structure from judicial review.[14] In the present case the ICC has not sought to shield its final decision from judicial review. Instead the Commission has commenced hearings on the original rates proposed by the petitioners, and any eventual final order stemming from those hearings is subpect to judicial scrutiny.

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[14] Judge Leventhal in his concurring opinion in *Continental Airlines, Inc.* v. *CAB*, 522 F.2d 107 at 131 (C.A.D.C., 1975) (en banc), emphasized the evasion of judicial review as the key to *Moss*.

In a case involving initial rates, if the ICC could not couple its suspension order with a statement of maximum allowable interim ceilings, the Commission would be forced to allow initial rates to go into effect, even if facially outrageous, subject only to lengthy investigation and hearing procedures, or to watch a possibly vital public service close down for want of a rate schedule. We doubt the Congress would have intended that the Commission face that Hobson's choice.

The use of interim rates as a condition to a suspension order is not unprecedented. In I & S Docket No. 8645, Orders (May 27, 1971, and June 29, 1971) the Commission ordered that increased lighterage charged proposed by the Penn Central Railroad be suspended but allowed the company to file interim rates containing additional charges not to exceed 50% of those initially proposed. The ICC's orders also required that Penn Central maintain an account from which refunds could be made to the extent that the proposed tariffs could not be justified to the Commission. In *Port of New York Authority* v. *U.S.*, 451 F.2d 783, 785-88 (CA2, 1971), the Second Circuit held that the Order was unreviewable and that federal courts lacked subject matter jurisdiction over an action challenging the Order.

We conclude that the ICC as corollary to its suspension power had the power to set out allowable rate ceilings for the seven-month period which, if filed, it would not suspend. Therefore, this aspect of its Order is not reviewable by this court.

3. *The refund provisions*

As a condition precedent to the interim rates which the Commission stated it would accept, the Commission required the carriers to establish refund provisions for use in the event that either the interim rates or the originally filed tariffs [15] or both should be found to be excessive.

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[15] As we noted prevously, if the Commission does not complete

With respect to this exercise of power for the seven-month period, like the power to suggest the interim rates themselves, we find this is a valid corollary to the suspension power, which we lack jurisdiction to review. *See Port of New York Authority* v. *U.S., supra.* We are less certain of the Commission's power to require the carriers to establish refund provisions with respect to the originally filed rates. However, we view this exercise of power as corollary to the power to suspend. Thus, insofar as the Commission's order reaches beyond the seven-month period, we are guided by *Chessie,* where the condition upheld by the Supreme Court was permanent.[16]

4. *Arbitrariness and confiscation*

The petitioners assert that the Commission action was an abuse of discretion and that the interim rate ceilings are so grossly insufficient that they are confiscatory in violation of the Fifth Amendment. Restating, we understand these contentions to be that even if the Commission is authorized by § 15(7) to act with respect to the subject matter, its exercise of power departed from constitutional standards. Assuming that we can review the Commission Order through these constitutional entry points the record before us gives no basis upon which we can act.

All motions to intervene are GRANTED. All motions for stay, suspension, injunction and other forms of interlocutory relief are DENIED. The motion of the United States to dismiss the petitions for review is GRANTED.

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its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect.

[16] Under § 15(7) the Commission may require carriers to keep records and make refunds after the seven-month period has expired. This expressly conferred authority is not what we rely upon—it relates to "a proposed increased rate or charge."

No. 77-2392—Mobil Alaska Pipeline Company v. United States of America and Interstate Commerce Commission

RONEY, Circuit Judge, dissenting:

I respectfully dissent. The thesis of the Commission is that it has the unreviewable authority to suspend the pipeline's initial rate filing and, as an adjunct of that authority, it has the power to fix an unreviewable interim rate for the seven month period. The idea that the Commission can set an unreviewable rate without following the statutory ratemaking procedures runs counter to the entire plan established by Congress in the Interstate Commerce Act.

This is ratemaking. We should not hide from that fact. The Commission candidly admits that it is making an interim rate. To suggest that the rate is "voluntary," that no rate has been set by the Commission because theoretically the pipeline companies could accept the seven month stay and not file for the interim rate, exalts form over substance in a way rarely countenanced by this Court. The Court, the Commission, the pipeline companies, and all parties to this proceeding know that an interim rate will have to be accepted by the respondents. Without a filed tariff, no oil can flow. No one has made the slightest suggestion in brief or oral argument that it would be either in the public or private interest for the transportation of this oil to be suspended for seven months while the Interstate Commerce Commission determines whether or not the proposed tariff is reasonable and just. *See* 43 U.S.C.A. § 1651 (Supp. 1977). We are given to understand that the rate here under consideration does not affect the price of oil at the delivery point, or the eventual price to the consuming public. Any transportation cost adjustment affects only the wellhead price of oil. Although there is almost complete identity between the affiliates which own the pipeline and those who receive the wellhead price, there are some others involved,

and the royalty to the State of Alaska and property owners varies with the wellhead price.

The argument that this is not ratemaking because it is only an interim and not a permanent rate loses force in numbers. The pipeline companies claim the difference between what they should get and what they will get under the interim rate could amount to $340,000,000. This sum is undoubtedly greater than the amount at stake in many permanent rates subject to ICC approval.

Although *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), and *United States* v. *Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973), are cited for the proposition that the grant or denial of a suspension order is not reviewable, they in fact only hold that a court has no authority at all to suspend a rate and that an ICC refusal to suspend is not reviewable under any statutory standards. They do not hold that a suspension order is unreviewable under constitutional due process standards. I would think that a suspension order in this case, where the lack of any tariff would effectively close down the Alaska Pipeline for seven months, and would eliminate any method of transporting the oil from the Alaska oil fields for that period of time, would be reviewable on a constitutional due process standard.

We are not confronted, however, with just a suspension order. The order before us is schizophrenic. It is both a suspension order *and* a ratemaking order.

This is a situation never previously confronted by the courts. In most situations, if a new rate is submitted to the ICC and the agency chooses to suspend it, this merely means that the carrier involved will continue to charge the rates already in existence. Thus the ICC need not take further action to ensure that the carrier can stay in business and collect charges that at least at one time were assumed to be reasonable, during the seven month period. Here, however, the Commission was faced with a brand new

entity. The Trans-Alaska Pipeline System had no preexisting rate schedule when it filed its "new" rate with the ICC. Thus, after deciding to suspend the filed rate, the ICC was faced with a situation which left no legal rate in effect for the seven month period. Unwilling to allow the pipeline to shut down, the Commission had to promulgate what is a "second" order, a ratemaking order.

Rate setting orders are clearly reviewable under the statute. Therefore I would not review the possible legality of just a suspension order here. I would accept this case for what it is: an attempt by the Commission to do two things, the first of which it would not do had it not the power to do the second. There is no indication in anything before us that the Commission would suspend the proposed tariff if it could not set an interim rate. Thus I would not reach the constitutional considerations that might demand review of a suspension order alone in this unique situation. There is no indication that the Commission would follow such a course. Its claimed authority to do so becomes merely the theoretical exercise of power onto which it hangs its ability to set an interim rate.

So I would assume without deciding that the Commission has the power to suspend the initial rate and go to the question of whether it can set the interim rate in the manner done here. If the interim rate cannot stand, I would send the case back to the Commission for whatever action it wishes to take within the confines of its legal authority. If it chooses to suspend without an interim rate, then on review a court could consider whether that action alone under the circumstances of this case can withstand the due process requirements of the Constitution. Or, if it chooses to arrive at some interim rate through procedures that have some resemblance to the ratemaking procedures which Congress had required, that too could be reviewed. However, I do not think that in order to decide the case before us we need to make any definitive decision as to whether an initial rate

suspension alone, under the facts of this case, would be legal, or whether the Commission can ever set interim rates in connection with a rate suspension. All I would now hold is that the Commission has no authority to do what it did here.

United States v. *Chesapeake & Ohio R.R.*, 426 U.S. 500 (1975), is the only controlling authority relied upon for the proposition that interim ratemaking is a necessary power under the suspension authority. In deciding that interim ratemaking is unreviewable, the majority opinion completely overlooks the fact that the Supreme Court considered the "conditions" imposed on the proposed tariff there to be reviewable.

> In this Court, Chessie has argued that . . . the application of the Commission's action to it is arbitrary and capricious. . . . Since the District Court held that the Commission did not have the power to impose conditions on the refiling of the tariff, it did not address this question. Chessie, if it chooses, may raise the matter on remand in the District Court.

426 U.S. at 515. To distinguish the point on the ground that in *Chessie*, the rate was permanent, must also distinguish the case beyond support for the proposition espoused in the case at bar.

This case is factually and legally different from *Port of New York Authority* v. *United States*, 451 F.2d 783 (2d Cir. 1971), relied upon by the majority. There the initial decision had been made to suspend the effective date of the proposed increase in tariffs. There was a tariff in effect after suspension, one which had already been determined to be reasonable either through Commission action or lack of complaint. The suspension order was concededly within the sole discretion of the Commission, and *all* that was involved was timing. The Commission offered to let the carrier collect an interim increase, if it chose to do so. For two reasons that case is not helpful here.

First, in that case, there was a good faith suspension order of the rate increase which did not cut off services. Here there is *no* indication that the Commission would suspend the tariff and consequently cause a seven month delay in service. In fact, we are told that in oral argument before the Commission, the director of the Commission's Bureau of Investigation and Enforcement indicated the owners of the pipeline might be subject to civil or criminal penalties if they did not file for these "voluntary" interim rates. Such view would dispel any thought that the public interest required a rate suspension. This is pointed out not to suggest that a suspension order would be reviewable under the statutory public interest standard, but only to emphasize that the Commission has made no such decision upon which to hang the *Port of New York Authority* holding.

Second, the pipeline companies' choice is not whether to adhere to present rates for seven months, or accept an interim increase, as was the case in *Port of New York Authority*, but whether to do business at all, or accept an interim rate. This does not make acceptance or rejection of the interim rate the viable choice that was available in that case.

The interim rate being reviewable, the next question is whether it can stand. Even if the Commission is permitted some leeway, and allowance is made for the fact that it "pursued a more measured course and offered an alternative tailored far more precisely (than a simple suspension) to the particular circumstances presented," *Chessie*, 426 U.S. at 514, the manner of arriving at the interim rate was beyond the most liberal reading of its statutory authority.

Congress has set well-established limits on the ICC's power to make rates. First, historically, the ICC did not have ratemaking power. It could set aside a rate as being unreasonable, but the Supreme Court found no implied power to set a reasonable rate. *ICC* v. *Cincinnati, New*

Orleans & Texas Pacific Ry., 167 U.S. 479 (1897). Only nine years later did Congress amend the Act to give the ICC power to set maximum rates, Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 689, and not until 1920 was it given power to set minimum rates, Act. of Feb. 28, 1920, ch. 91, § 418, 41 Stat. 484.

Second, the ICC has the power to set rates *only after* it has determined that a proposed rate is unreasonable. That principle has been reiterated in several cases which indicate that it is the carriers who have the right to propose initial rates. *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 89 (1913) ("Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order." 227 U.S. at 92). *See also New York* v. *United States*, 331 U.S. 284 (1947); *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 522 (1923); *Southern Pacific Co.* v. *ICC*, 219 U.S. 433 (1911); *ICC* v. *Chicago Great Western Ry.*, 209 U.S. 108, 118-119 (1908).

Third, a proposed rate can be found unreasonable *only after* a full hearing. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262 (1932) ("The legal standards governing the action of the Commission in determining the reasonableness of the rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement.") The courts have consistently held that a finding by the ICC of unreasonableness of the rate proposed by the carrier must be supported by substantial evidence on the record as a whole. *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271 (1926); *Skinner & Eddy Corp.* v. *United States*, 249

U.S. 557, 562 (1919); *Archer Daniels Midland Co.* v. *United States*, 301 F. Supp. 328 (D. Minn. 1969) (3-judge court); *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 282 F. Supp. 430, 434 (D. Kan. 1968) (3-judge court).

Last, the ICC can establish a rate only after a *full evidentiary hearing. Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262 (1932); *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 89, 93 (1913). That hearing requirement is not satisfied by the "brief and informal hearing" which accompanies a suspension order. *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 672 (1963). The case for strict enforcement of the hearing requirement is particularly strong because this rate applies to so few companies, and the administrative inconvenience of multiple parties which sometimes justifies lowered procedural standards is not present. *Compare Londoner* v. *Denver*, 210 U.S. 373 (1908) (individual property assessment without hearing invalid) with *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915) (city-wide revaluation does not require individual adjudication). Even in the multi-party rate cases, administrative hearings have withstood attack only when the agency granted adequate notice and opportunity to comment both on the original rate proposal and on the comments made by others. *See Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1074-1076 (5th Cir. 1975), *cert. denied sub nom., California Co.* v. *FPC*, 426 U.S. 941 (1976).

In this case where is the finding of unreasonableness of the proposed rate on an evidentiary record, and where is the record to support the interim rate? The Commission readily admits that it cannot support either finding by record evidence.

But procedural unfairness is only the beginning of the arbitrariness in this case. The real difficulty, and the problem that makes the procedural shortcuts so detrimental to the petitioners, is that Congress through the Act has provided a reasonable way to protect *all* parties in this pro-

ceeding against the effect of error in the proposed rate, but the Commission has, without offer of justification, ignored it in the proposed interim tariff. If the rate is determined to be too high, the carriers may be forced to refund, with interest, 49 U.S.C.A. § 15(7) (Supp. 1977), or pay back as damages, with costs and attorneys' fees, 49 U.S.C.A. § 8, an overcharge collected prior to rate determination. In other words, the parties overcharged can be made whole. If the interim rate is too low, however, the ICC program provides no means whatsoever for the pipeline to recover the difference between what it was required by the Government to charge, and what that same Government later decides would have been a reasonable rate. To have a way to protect all interests, and not take it, and subject one party to the possibility of irreparable loss, is impermissible under even the most deferential standard of judicial review.

The complainants argue that a system of refunds would produce justice at the price of delay. Even justice delayed, however, is preferable to justice forever denied. At oral argument, Commission's counsel suggested no harm had been done because the interim rate is the highest rate that could reasonably be established for the pipeline. That statement constitutes a gross prejudgment of what the ICC will do, and overlooks entirely the reviewable nature of the Commission's ultimate ratemaking action. Without a sufficient record to support a finding of anything at all, and with serious questions about the rate of return, the treatment of inflation, and allowances for depreciation, counsel would have this Court predict what Commissioners, who may not be in office now, will do on the evidence presented them, and what a court of judges, who may not be in office now, will do on review of whatever those Commissioners do.

Nor can this Court sustain the interim rate by obeisance to the expertise of the Commission. Only after a full hearing upon complaint made does the law give weight or significance to the opinion of the Commission. *Atlantic Coast*

Line R.R. v. *ICC*, 194 F. 449 (Commerce Ct. 1911). The expertise of the Commission can only be relied upon after it has exercised its expert judgment on the record before it. *See* Pedersen, *Formal Records & Informal Rulemaking*, 85 Yale L.J. 38 (1975).

Hence I would hold that the Commission had no authority to set in the way it did the interim rate which was forced upon the carriers. I would set aside that proposed interim rate for these reasons: *first*, the Commission did not even attempt to follow congressionally mandated procedures for setting rates; *second*, without some specific finding of unreasonableness in the proposed rate, it appears arbitrary not to follow the statutory plan by which all parties could be protected against any eventual rate determination, and to follow a course which would cause irreparable damage to the pipelines if their position is eventually sustained; *third*, the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative risks of equity capital, a rate arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor.

I would set aside the Commission's Order of June 28, 1977 and remand the case to the Commission for further consideration consistent with its statutory authority.

APPENDIX B

(Caption Omitted in Printing)

Before Brown, Chief Judge, Godbold and Roney, Circuit Judges.

Judgment

This cause came on to be heard on the petitions of Mobil Alaska Pipeline Company, BP Pipelines Inc., Exxon Pipeline Company and Arco Pipeline Company for review of an order of the Interstate Commerce Commission, and was heard on the motion papers on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the petitions for review of an order of the Interstate Commerce Commission in this cause be, and the same are hereby dismissed. All motions to intervene are GRANTED. All motions for stay, suspension, injunction and other forms of interlocutory relief are DENIED.

July 29, 1977

Issued as Mandate: Sept. 8, 1977

A true copy

Teste: Edward W. Wadsworth
Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ Clare F. Sachs
Sept. 8, 1977

APPENDIX C

June 29, 1977

(SERVICE DATE JUNE 28, 1977)

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 28th day of June, 1977.

INVESTIGATION AND SUSPENSION DOCKET No. 9164

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

No. 36611

TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

Initial rate tariffs have been filed by eight pipeline companies, proposing to operate as common carriers of crude petroleum over the Alaska Pipeline System.

Protests and petitions for suspension of the tariffs have been filed by the United States Department of Justice, the State of Alaska, the Arctic Slope Regional Corporation and our Bureau of Investigations and Enforcement. These pleadings seek to invoke our power under section 15(7) of the Interstate Commerce Act (1) to enter upon a hearing concerning the lawfulness of the tariffs and (2) pending the hearing and decision, to suspend the operation of the tariffs for a period no longer than seven months. Replies to the protests have been filed by each of the eight carriers.

The tariffs are identified in Appendix 1 to this order. As noted therein, the various rules contained in the tariffs have already been placed under investigation by Commis-

sion order dated June 17, 1977, No. 36611. Consideration of the tariff rates, however, was deferred to the present order. The rates per barrel proposed by the respective companies are as follows:

Amerada Hess Pipeline Corporation	$6.44
Arco Pipe Line Company	6.04
BP Pipelines Inc.	6.35
Exxon Pipeline Company	6.27
Mobil Alaska Pipeline Company	6.31
Phillips Alaska Pipeline Corporation	6.22
Sohio Pipe Line Company	6.16
Union Alaska Pipeline Company	6.09

With respect to these rates, we have given careful consideration to the protests, and to the carriers' replies. In addition, we have heard oral argument by the parties. It is our conclusion that a formal investigation concerning the lawfulness of the proposed rates should be instituted pursuant to sections 15(1) and 15(7) and that because of the close interrelationship of the rate filings and the applicable rules and regulations, they should be considered in the same proceeding. We further conclude that such rates should be suspended, without prejudice to the filing of interim rates, during the suspension period.

In reaching these conclusions, we have considered the following issues: (1) whether an investigation should be instituted; (2) whether the proposed rates can and should be suspended; (3) whether interim rates can and should be authorized; (4) what level of interim rates should be authorized; and (5) what conditions should be attached to the acceptance of interim rate filings.

The institution of an investigation.

Section 15(7) of the act empowers the Commission to enter upon a hearing concerning the lawfulness of a filed tariff stating a new rate or charge. In order for a rate to

be lawful, a primary requirement is that it be just and reasonable (section 1(5)). The act sets forth other requirements as well, and if an investigation is instituted, any and all aspects of the lawfulness of the rate may be considered. However, the chief question raised by the protests is whether the proposed rates are just and reasonable.

Protestants contend that the filed rates would provide excessive profits, whether compared with a traditional rate of return on valuation or with the carriers' capital costs. They also contend that the cost data provided by the carriers is overstated.

The carriers reply that their rates were computed to allow a 7 percent return on valuation, as contemplated in a 1941 consent agreement between the Justice Department and a number of shipper-owned pipelines (*United States* v. *Atlantic Refining Co.*, C.A. No. 14060, D.D.C. decided December 23, 1941). They also assert that the standards used by protestants are unrealistic in that they do not recognize that the carriers are able to maintain high levels of debt financing only because such debt is guaranteed by the parent oil companies. The carriers argue that, without such guarantees, they would have to resort to a larger amount of equity financing, and their overall capital costs would be higher than the amounts recognized by protestants. The carriers also deny that their cost data is overstated. However, they do not object to a formal investigation of the filed rates.

For reasons set forth below, we do not accept the 1941 consent decree as a standard of reasonableness under the Interstate Commerce Act. Moreover, while there may be merit to the carriers' contentions that the standards used by protestants do not cover their true costs of capital, this is a matter that cannot be resolved until a more complete record is developed. Finally, evidentiary hearings will be necessary to develop acceptable cost data for use in applying whatever measures of reasonableness are found to be

appropriate. Therefore, we conclude that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates.

The suspension of the proposed rates. Some of the carriers argue that the Commission is without power to suspend initial rates. They rely on numerous references in legislative history and past cases to exercise of the suspension power in instances of "increased" rates. They rely on such references to conclude that the power of suspension does not apply to initial rates. However, the reason that the suspension powers are usually discussed in the context of increased rates is clear: the vast majority of rate proceedings involve situations where increases in existing rates are at issue.

We see no basis in the sources cited for concluding that we may not suspend initial rates. If this were the Congressional intention, we believe that it would have been explicitly stated. It was not so stated, and the carriers have been unable to cite any direct authority for their position.

It is stated in section 15(7) that the Commission is authorized to enter upon a hearing concerning "any schedule stating a new individual or joint rate, fare, or charge." Pending this hearing and decision, the Commission may suspend, for up to seven months, the schedule being investigated. In *Rail-Water, Grain in Bulk, Mo., Ill., and Ind., to Buffalo,* 321 I.C.C. 564, 566 (1963), it was said that the term "new rate" in section 15(7) encompasses "both changed and initial" rates.

Similar suspension powers pertaining to other modes of carriage are contained in sections 216(g), 218(c), 307(g), and 406(e) of the act. In each of these sections, there is "grandfather" language making the provisions inapplicable to "initial" rates filed on or before a certain date. By implication, then, the investigation and suspension provisions *are* applicable to initial rates filed after such date.

As noted, if it were intended to exclude initial rates from the suspension power of section 15(7), one would expect specific language to this effect. No such language appears. Accordingly, we have no doubt that the suspension power is applicable to initial rates.

The carriers also question whether, even if the suspension power is applicable, we should exercise it here. They argue that protestants would not be harmed by allowing the proposed rates to go into effect, inasmuch as refunds or reparations would be available if the investigation should show that the filed rates are too high.

Protestants, however, do not consider the possibility of refunds to be adequate protection. The Arctic Slope Regional Corporation, which represents Alaskan Natives, notes that the longer it must wait for its share of royalty revenues (which are adversely affected by high transportation rates), the less value such revenues will have. Protestants also argue that the maintenance of pipeline rates at too high a level would act as a deterrent to the use of the pipeline by independent oil producers.

Although we recognize that the refund remedy is available, we do not believe that the rates can be allowed to go into effect without suspension, when, as here, the protestants have made a showing or [sic] probable unlawfulness. Moreover, as noted by protestants, the maintenance of excessively high rates could act as an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil. Under the circumstances, we have concluded that the proposed rates, as filed, should be suspended, pending our investigation, for the statutory period of 7 months.

The authorization of interim rates. Protestants seek to have the Commission name specific rates that may be charged by each carrier while the investigation is being

conducted. The carriers, however, contend that the Commission has no power to do so. They argue that the specification of interim rates would be a rate prescription within the meaning of section 15(1) of the act, and that we are empowered to take such action only after a full hearing.

We see no basis for considering such action to be a prescription of rates.[1] We may authorize interim rates without requiring that the rates proposed in the tariffs be cancelled, and without precluding the proposed rates from taking effect at the end of the 7-month suspension period if our investigation is not then completed (subject, however, to a refund provision as hereafter described). These interim rates would not be intended to have permanent effect, but would merely be interim rates that we would allow to be collected during the suspension period. Such rates, if filed, remain subject to Commission scrutiny and are not to be considered as prescribed within the meaning of the decision in *Arizona Grocery* v. *Atchison, T. & S.F. Ry., Co.*, 284 U.S. 370.

We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe

[1] *Moss* v. *C.A.B.*, 430 F. 2d 891, is clearly distinguishable. That case involved ex parte meetings and the substitution by the Board of "a complete and innovative scheme for setting all passenger rates for the Continental United States," with an indication that such a filing would not be suspended. In *Moss*, the court noted that unlike the Interstate Commerce Act, the Federal Aviation Act has no provision for reparations, thus rendering the procedural safeguards of the Aviation Act the public's sole defense. The court also pointed out its view might have been different if interim action were involved. In the present TAPS proceedng, both the proposed rates and any interim rates which may be filed *will* remain subject to full investigation. See also *Consolidated Edison Co. of New York* v. *F.P.C.*, 512 F. 2d 1332, 1340, distinguishing *Moss* v. *C.A.B.* and stressing the behind-the-scenes aspect of the *Moss* case.

that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest.

Having concluded that we possess the power to authorize interim rates, we have no hesitation about taking such action in the present circumstances. If we were to suspend the proposed rates without allowing interim rates, the result would be to preclude the carriers from commencing their operations during the suspension period. Such a result would be contrary to the interests of all concerned.

The level of interim rates. We believe that the proper question to be asked concerning our action in these proceedings is not whether we have the discretion to authorize an interim rate. Rather, the question should be whether we have exercised such discretion in a reasonable manner.

The key to a proper exercise of our discretion in this situation lies in recognizing the possible consequences of our action. We must bear in mind that the carriers may have no means of obtaining restitution if initially required to maintain too low a rate. On the other hand, a remedy by way of refunds or reparations is available to persons injured by the charging of a rate that is ultimately found to be too high. In these circumstances, the reasonable approach to determining an interim rate is (1) to accept the basic data supplied by the carriers and (2) at the same time to require a refund provision in the event that such amounts are ultimately determined to exceed a reasonable level. This, then, is the course that we shall follow.

The process of arriving at an acceptable interim rate requires two steps. The first is to define the basic carrier data that will be employed, and the second is to perform computations using such data.

The data that we will employ is set forth in Appendix 2. For the purposes of the present decision, we have, for the

most part, employed the figures supplied by the carriers. Appendix 2 displays this data both in total dollars and in dollars per barrel. The conversion to per-barrel figures is based on the assumption that the normal traffic volume for the beginning years will be 438 million barrels a year (1.2 million barrels a day), and that this number of barrels will be apportioned among the carriers according to their respective ownership shares in the pipeline.

Of the items set forth in Appendix 2, substantial questions have been raised at this stage of the proceeding particularly with regard to removal and restoration costs and depreciation. Removal costs are the costs expected to be incurred at the end of the useful life of the pipeline in order to meet environmental requirements. According to the Alyeska Pipeline Service Company, these costs will amount to about $1.049 billion in 1977 dollars. Some of the carriers propose to simply set aside one twenty-fifth of their total share of this amount each year for 25 years. Others propose more detailed computations to inflate the removal costs to dollar costs for the year 2002, and to allow for compounded interest on the yearly accruals. The protestants, on the other hand, seek to reduce the yearly removal charges by requiring that they be amortized over a period longer than 25 years.

With respect to depreciation charges, the carriers uniformly propose a 25-year service life, on the basis that known recoverable reserves on the North Slope are expected to be depleted in terms of economic recovery in 25 years. Protestants propose that service lives as long as 35 years be required, on the basis that additional oil fields exist on the North Slope that are likely to extend the pipeline's useful life and that even the present reserve may have a longer life than 25 years.[3]

[3] It should be noted that at oral argument several protestants did not dispute the use of 25 years at the suspension level.

Both of these issues will receive substantial attention during our formal investigation. However, at this stage of the proceedings, the data presented concerning additional reserves is of a somewhat uncertain nature. We do not deem this data sufficient to warrant a reduction in the amount allowed for depreciation for the purposes of determining the lawfulness of the proposed rates at the suspension level. By the same token, we will not, at this time, compute removal charges over an amortization period of more than 25 years.

For removal costs, we have used the same per-barrel allowance for each carrier, because we see no basis for cost differences among the carriers on this item. Our allowance is based on a simple amortization without inflation or discounting. While this approach may somewhat understate the amounts that need to be accrued, the magnitude of the discrepancy would not be great in terms of the overall tariff computation. It may well be outweighed by overstatement in the depreciation charges.

An additional issue is raised by protestants concerning the investment and valuation figures. It is their contention that these figures are affected by excessive construction costs. Needless to say, this issue will be a major focus of our formal investigation. However, as the protestants themselves concede, this is not a matter that can be properly dealt with at the present stage of the proceeding. Accordingly, the investment figures provided by the carriers will be used at this time. Our valuation staff has used the same data in providing valuation figures for present purposes.

In one aspect, the investment data shown on Appendix 2 differs from figures supplied by certain carriers in that it does not include an amount for working capital. Not all of the carriers reported working capital as part of their investment. Those that did appear to have used no consistent standard. For this reason, and because a satisfactory basis for judging the carriers' working capital needs has not been

shown, we have omitted it from the investment figures.[3] We believe that our action in this respect is more than compensated by our liberality in not averaging down the investment figures for depreciation over the first few years.

Having the basic data at hand, we turn now to the question of rate computation.

In justifying the filed tariff rates, the carriers contend that the proposed rates are merely sufficient to cover expenses and interest and to allow an after-tax return on equity equal to 7 percent of their valuation. They consider this method of gauging a return on equity to be permissible since it is used in the 1941 consent agreement between the Justice Department and a large number of shipper-owned pipelines.

However, the consent decree standard has never been employed in a Commission proceeding as the test of reasonableness of rates. Its sole legal status is as a limit on the amount of dividends that pipelines may pay to shipper owners without risking prosecution under the Elkins Act for illegal rebates. Moreover, as a standard of reasonableness, it has nothing to recommend it from a conceptual standpoint. Although valuation is a measure of the entire investment, the consent decree standard allows a return on valuation to be used entirely to compensate one segment of the capital invested. Such a standard can have no relationship, except by coincidence, to the carriers' true capital costs. As shown in Appendix 3, the filed rates would produce returns on equity ranging from 31 percent to 96 percent. Even if the carriers had a lower capital structure of 60 percent debt and 40 percent equity, the proposed rates would provide returns on equity ranging between 16.8 percent and 20.6 percent. The Department of Justice suggests 14 percent as a suitable number for use as the cost of equity

[3] An allowance for working capital has, however, been included in the staff evaluation estimates reflected in Appendix 2.

capital at this stage of the proceeding. We agree that this would be a suitable figure for present purposes. Accordingly, it can be seen that the filed tariff rates would produce returns exceeding capital costs, even where the carriers' own expense and investment data are accepted.

Inasmuch as the carriers' justification does not appear satisfactory, we must next consider what standards would be appropriate based on our own precedents. As we noted in No. 35533, *Petroleum Products, Williams Brothers Pipe Line Company,* —— *I.C.C.* —— (1976), the standards we have applied in the past have been an 8 percent return on valuation for crude oil pipelines and 10 percent on valuation for petroleum products pipelines.

At the outset, we have questions about the appropriateness of an 8 percent return in this instance, where annual interest rates generally exceed 8 percent. The small margin of earnings in excess of interest that would result is demonstrated in Appendix 4. As may be seen, rates computed on this basis would range from $3.74 for BP to $4.16 for Exxon. Further study of this table shows that five of the eight carriers would have returns on equity of 10 percent or less under this standard, and returns for some would be lower than 3 percent. Such a return would be unreasonably low.

It should be noted that the 8 percent on valuation standard arose in the early 1940's, when capital costs were substantially lower than they are today. It could continue to provide a substantial return on original investment to established carriers, whose valuations have risen well above their actual investment because of inflation. In the case of the TAPS carriers, however, their property was constructed so recently that valuation is little higher than actual cost, and an 8 percent return on valuation becomes quite deficient.

The question arises, then, as to whether the Commission can permissibly depart from its previous standards in these

proceedings. The answer lies in the fact that, whatever standards we use, the earnings allowed to the carriers must comply with governing judicial requirements. The controlling standard, set forth in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), is that a regulated firm must be allowed enough revenue not only for operating expenses, but also for the capital costs of the business. Such revenue most cover service on the debt and a return on equity sufficient to attract capital. [See also section 15a(2).]

For the purposes of the present decision, we have determined that the standard of a 10 percent return on valuation for petroleum products pipelines is appropriate for the TAPS carriers. Our selection of the 10 percent return on valuation standard is based primarily on two factors. One is that the magnitude and inherent attributes of the TAPS project produce a higher risk factor than is normal in crude oil pipeline operations. Many of the construction features are being tested for the first time. Geographic terrain, environmental and temperature problems, possible earthquakes, vulnerability to sabotage, future oil pricing policies, and regulatory uncertainty are among the factors to be considered. Moreover, a 10 percent return on valuation appears generally sufficient to cover estimated capital costs. As previously noted, an 8 percent return on valuation produces generally insufficient returns on equity.

As shown in Appendix 5, a 10 percent return on valuation produces for the individual carriers on their actual capital structure returns on equity ranging from 13.3 percent to 54.3 percent, with no figure for Mobil which claims to be totally debt financed. The composite return on equity is 23 percent.

While these returns on equity have been challenged by protestants, the carriers note that they have an abnormally high proportion of debt in their capital structures, which is made possible by the fact that their debt obligations are

unconditionally guaranteed by their parent oil companies. The carriers would argue that tariff rates based on 10 percent return on valuation provide a much lower return on equity with a more normal capital structure.

Although the 10 percent return on valuation appears suitable for present purposes, we stress that it is not intended to be a general standard nor to be a prejudgment of criteria to be used upon the conclusion of the investigation in these proceedings, nor is it in any way to be considered a prejudgment of the issues in Ex Parte No. 308.

Conditions for the acceptance of interim rate filings. The Bureau of Investigations and Enforcement asks that the carriers be required to produce a number of types of documents as a condition to our acceptance of interim rates. The carriers, however, contend that BIE's proposed condition is an attempt to circumvent the Commission's established discovery rules, and should not be adopted.

We have concluded not to impose the requested condition in the present order. We do not believe that such orders are a necessary subject for inclusion in an order disposing of petitions for suspension of a tariff. Any future request for orders can be handled as separate matters later, when all factors concerning the production of the requested data can be properly considered. In addition, we note that at oral argument, the carriers indicated their willingness to cooperate in the production of documents. We shall expect them to abide by this agreement.

The other condition requested by protestants pertains to possible refunds of excess charges collected under the interim rate. We recognize that even the lower interim rate levels may prove upon investigation to exceed reasonable levels. Therefore, as a condition to filing such interim rates, we will require that the carriers keep account of the amounts collected, and that they agree to refund any portion of such amounts that may ultimately be established as excessive.

Immediately prior to the oral argument on June 27, 1977, the Department of Justice filed a memorandum in reply to the responses of the carriers together with a motion for leave to file. Neither the special procedure adopted in this case nor our rules of practice contemplate replies to replies and the motion for leave to file is denied.

In the paragraphs below, the tariffs of Phillips Alaska Pipeline Corporation are not included. As noted in Appendix 1, a separate order with respect to Phillips will be issued before July 20, 1977.

Is it ordered, That the operation of the schedules authorized below be, and it is hereby, suspended, and that the use thereof in interstate or foreign commerce be deferred from June 30, 1977, and to and including January 29, 1978, except as to I.C.C. 2, published by Amerada Hess, which bears a July 1 effective date and the operation of which is suspended to January 31, 1978, unless otherwise ordered by this Commission;

I&S No. 9164

AMERADA HESS PIPELINE CORPORATION
I.C.C. No. 2

ARCO PIPE LINE COMPANY
I.C.C. No. 1030
on page 14, the rate of $6.04

BP PIPELINES, INC.
I.C.C. No. 2

EXXON PIPELINE COMPANY
I.C.C. No. 125

MOBIL ALASKA PIPELINE COMPANY
I.C.C. No. 2

SOHIO PIPE LINE COMPANY
I.C.C. No. 742
on the title page, the rate of $6.16

UNION ALASKA PIPELINE COMPANY
I.C.C. No. 2

IT IS FURTHER ORDERED, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates contained in the suspended schedules, as aforesaid, as well as the interim schedules authorized to be filed, pursuant to section 15(1) and section 15(7), with a view to making such findings and orders in the premises as the facts and circumstances shall warrant. In the event the schedules here under investigation are changed, amended or reissued, upon termination of the suspension period and the investigation not having been concluded, such changed, amended or reissued schedules will be included in this investigation.

IT IS FURTHER ORDERED, That the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said rates under the Interstate Commerce Act.

IT IS FURTHER ORDERED, That the named carriers be, and they are hereby, authorized to file, upon not less than one day's notice, interim rates not exceeding the following amounts:

Amerada Hess Pipeline Corporation	$4.85
Arco Pipe Line Company	4.91
BP Pipelines Inc.	4.68
Exxon Pipeline Company	5.10
Mobil Alaska Pipeline Company	4.84
Sohio Pipe Line Company	4.70
Union Alaska Pipeline Company	4.89

subject, however, to the condition that (1) the interim tariffs contain a refund provision to the effect that if the

rates charged exceed the rates subsequently authorized or prescribed by the Interstate Commerce Commission, the carriers will refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed by the Interstate Commerce Commission with interest computed in accordance with section 15(8)(e) of the act, added by the Railroad Revitalization and Regulatory Reform Act of 1976; and (2) that the carriers file (effective on not less than 1 days [sic] notice) a similar refund provision applicable to the original proposed rates. Although that section does not apply to pipelines, it represents the latest expression of Congressional interest, and the Commission's notice of April 14, 1977 indicated its applicability to all carriers under Part I. It should also be noted that the carriers at the oral argument expressed assent to an even higher rate of interest in the event of an investigation without suspension. Under the circumstances, we believe interest computed in accordance with section 15(8)(e) would be fair to all parties.

AND IT IS FURTHER ORDERED, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be served upon the carriers parties to the said schedules, and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission. (Commissioner Brown approves the order except insofar as it denies the motion of the Department of Justice for leave to file a response to the carrier's responses).

(SEAL)

H. G. HOMME, JR.,
Acting Secretary.

I&S No. 9164

Appendix 1

INITIAL TARIFFS APPLICABLE TO THE TRANS ALASKA PIPELINE SYSTEM

Carrier	*Tariff No.*	*Filing Date*	*Effective Date*
Amerada Hess Pipeline Corporation	I.C.C. No. 1 (rules)	June 1, 1977	July 1, 1977
	I.C.C. No. 2 (rate)	June 1, 1977	July 1, 1977
Arco Pipeline Company	I.C.C. No. 1030	May 27, 1977	June 30, 1977
BP Pipelines, Inc.	I.C.C. No. 1 (rules)	June 3, 1977	June 20, 1977
	I.C.C. No. 2 (rate)	June 3, 1977	June 30, 1977 [1]
Exxon Pipeline Company	I.C.C. No. 124 (rules)	June 8, 1977	June 20, 1977
	I.C.C. No. 125 (rate)	June 8, 1977	June 30, 1977
Mobil Alaska Pipeline Company	I.C.C. No. 1 (rules)	June 10, 1977	June 20, 1977
	I.C.C. No. 2 (rate)	June 10, 1977	June 30, 1977 [1]
Phillips Alaska Pipeline Corporation	I.C.C. No. 1 (rules)	June 20, 1977	July 20, 1977 [2]
	I.C.C. No. 2 (rate)	June 20, 1977	July 20, 1977 [2]
Sohio Pipeline Company	I.C.C. No. 742	June 3, 1977	July 30, 1977 [1]
Union Alaska Pipeline Company	I.C.C. No. 1 (rules)	June 15, 1977	June 30, 1977
	I.C.C. No. 2 (rate)	June 15, 1977	June 30, 1977

Tariff rules filed by all of the named carriers except Phillips were placed under investigation in No. 36611 by order of the Commission served June 17, 1977. Consideration of the rates filed by those carriers was deferred to the present order.

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[1] Postponed from June 20, 1977.

[2] Because of the later effective date of these tariffs, the time for filing protests and replies to them has not yet expired. The question of their suspension or investigation will be the subject of a separate order by the Commission, to be issued prior to July 20, 1977.

BASIC CARRIER DATA
(000 omitted)

		AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Operating Costs	Total	6,500[1]	90,250[1]	64,757[1]	81,900[1]	19,699[1]	6,139[1]	135,200[1]	6,499[1]	410,944
	Per Barrel	.989	.981	.933	.935	.899	.844	.926	.894	.938
Removal Costs	Total	629[2]	8,812[2]	6,646[2]	8,392[2]	2,098[2]	697[2]	13,989[2]	697[2]	41,960
	Per Barrel	.096	.096	.096	.096	.096	.096	.096	.096	.096
Investment	Total	144,031[3]	1,931,850[3]	1,467,240[3]	1,837,000[3]	459,500[3]	147,369[3]	3,138,500[3]	142,985[3]	9,268,475
	Per Barrel	21.923	21.003	21.148	20.970	20.982	20.268	21.492	19.665	21.161
Depreciation	Total	5,754[4]	77,247[4]	59,794[4]	73,700[4]	18,080[4]	6,061[4]	126,200[4]	5,750[4]	372,586
	Per Barrel	.876	.840	.862	.841	.826	.834	.864	.791	.851
Debt	Total	116,957[5]	1,814,887[5]	1,255,947[5]	1,431,250[5]	459,500[5]	120,000[5]	2,707,500[5]	128,439[5]	8,034,480
	Per Barrel	17.802	19.731	18.103	16.338	20.982	16.504	18.541	17.665	18.344

BASIC CARRIER DATA (Continued)

Interest	Total	11,288[6]	140,200[6]	118,889[6]	114,500[6]	32,674[6]	10,125[6]	252,480[6]	9,369[6]	689,525
	Per Barrel	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Interest Rate		9.651%[7]	7.725%[7]	9.466%[7]	8.000%[7]	7.111%[7]	8.438%[7]	9.325%[7]	7.295%[7]	8.582%
Equity	Total	27,074[8]	116,963[8]	211,293[8]	405,750[8]	—0—[8]	27,369[8]	431,000[8]	14,546[8]	1,233,995
	Per Barrel	4.121	1.272	3.045	4.632	—0—	3.764	2.951	2.001	2.817
Valuation	Total	148,900[9]	2,036,000[9]	1,541,200[9]	1,937,500[9]	484,500[9]	158,200[9]	3,271,400[9]	155,900[9]	9,733,600
	Per Barrel	22.664	22.135	22.214	22.118	22.123	21.758	22.402	21.441	22.223
Debt/ Equity		81.2/18.8	93.9/6.1	85.6/14.4	77.9/22.1	100.0/0.0	81.4/18.6	86.3/13.7	89.8/10.2	86.7/13.3

FOOTNOTES TO BASIC CARRIER DATA

Amerada Hess

1. Reported in undated statement submitted by Amerada Hess entitled "General Assumptions for Calculating TAPS Tariff as of May, 1977."
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Amerada Hess' ownership share (1.50 percent).
3. Amerada Hess' share (1.50 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Amerada Hess' capitalized construction interest ($22,670,500) and capitalized overhead costs ($1,735,400) as reported by letter from R.K. Stafford dated May 13, 1977.
4. Reported in letter from R. K. Stafford dated June 1, 1977.
5. Reported in "General Assumptions" statement.
6. Reported in "General Assumptions" statement.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Arco

1. Reported in letter from J.D. Wessling dated June 1, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Arco's ownership share (21 percent).
3. Arco's share (21 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Arco's capitalized construction interest ($257,100,000),

as reported in letter from J.D. Wessling dated June 1, 1977.

4. Reported in letter dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in June 1, 1977 letter.
7. Weighted average interest rate of debt issues shown in a letter from J.D. Wessling dated June 2, 1977.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

BP

1. Reported in BP's submission of June 15, 1977, in explanation of filed tariff rates.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by BP's ownership share (15.84 percent).
3. BP's share (15.84 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus BP's capitalized construction interest and overhead costs ($204 million), with the latter as reported in BP's submission of June 15, 1977.
4. Reported in BP's submission of June 15, 1977.
5. Investment less equity.
6. Reported in a letter from P.H. Jones dated May 27, 1977.
7. Interest divided by debt.
8. Reported in a letter from P.H. Jones dated June 14, 1977.
9. Staff estimate based on reported investment figures.

Exxon

1. Reported in Appendix A to Exxon's reply to protests.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Exxon's ownership share (20 percent).
3. Exxon's share (20 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Exxon's capitalized construction interest ($242 million), with the latter as reported in a letter from J.D. Sturtevant dated March 21, 1977.
4. Reported in a letter from J.D. Sturtevant dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in Appendix A to Exxon's reply to protests.
7. Reported in Appendix A to Exxon's reply to protests.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Mobil

1. Reported in a letter from C.R. Thompson dated May 27, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Mobil's ownership share (5 percent).
3. Mobil's investment, including capitalized construction interest ($57.7 million) and capitalized overhead costs ($3.2 million) as reported in a letter from C.R. Thompson dated April 29, 1977.
4. Reported in letter dated May 27, 1977.
5. Debt presumed to be 100 percent of investment. Data filed by Mobil gives no indication of equity financing.

6. Reported in letter dated May 27, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Phillips

1. Reported in a letter from James Mullen dated July [sic; June] 20, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Phillips' ownership share (1.66 percent).
3. Phillips' share (1.66 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Phillips' capitalized construction interest ($14,944,000) and capitalized overhead costs ($40,000), with the latter items as reported in letter of June 20, 1977. Working capital ($1,480,000) excluded.
4. Reported in undated statement entitled "Phillips Petroleum Company—Estimate of Expenses."
5. Reported in letter of June 20, 1977.
6. Reported in letter of June 20, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Sohio

1. Reported in a letter from J.T. Boltacz dated June 13, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Sohio's ownership share (33.34 percent).

3. Sohio's investment (3,138.5 million) as reported in letter dated June 13, 1977. Working capital ($13 million) excluded. Subtracting Sohio's share of Alyeska investment would indicate $479,635,000 as capitalized construction interest and overhead costs.
4. Reported in letter dated June 13, 1977.
5. Reported in letter dated June 13, 1977.
6. Reported in letter dated June 13, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Union

1. Reported in a letter dated May 27, 1977, from E.J. Takach.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Union's ownership share (1.66 percent).
3. Union's share (1.66 percent) of Alyeska investment ($7,975 for facilities plus $16 million for land), plus Union's capitalized construction interest ($10.6 million), with the latter as reported in a letter from David M. Schwartz dated June 14, 1977.
4. Reported in letter dated May 27, 1977.
5. Reported in letter dated June 14, 1977.
6. Computed from debt description in letter dated June 14, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Appendix 3

EFFECTS OF FILED TARIFF RATES

I&S No. 9164

	AMERADA HESS	ARCO	BP	EXXON	MOBIL
Revenue (Rate)	6.440	6.040	6.350	6.270	6.310
Less:					
Operating	.989	.981	.933	.935	.899
Depreciation	.876	.840	.862	.841	.826
Removal Costs	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492
Less Taxes	1.461	1.375	1.452	1.635	1.585
Return on Equity	1.300	1.224	1.293	1.456	1.412
Percentage Returns:					
On Equity	31.5%	96.2%	42.5%	31.4%	(no equity)
On Total Investment	13.8%	13.1%	14.2%	13.2%	13.8%
On Valuation	13.3%	12.4%	13.5%	12.5%	13.1%

	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Rate)	6.220	6.160	6.090	6.211
Less:				
Operating Costs	.844	.926	.894	.938
Depreciation	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096
Less Interest	1.393	1.729	1.289	1.574
Less Taxes	1.615	1.346	1.598	1.456
Return on Equity	1.438	1.199	1.422	1.296
Percentage Returns:				
On Equity	38.2%	40.6%	71.1%	46.0%
On Total Investment	14.0%	13.6%	13.8%	13.6%
On Valuation	13.0%	13.1%	12.7%	12.9%

Appendix 4

TARIFF COMPUTATION

Allowing 8 Percent Return on Valuation—Actual Capital Structure

	AM HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (RATE)	3.881	3.965	3.739	4.160	3.903	3.905	3.749	3.975	3.892
Less:									
Operating Cost	.989	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Tax	.107	.277	.071	.519	.312	.390	.071	.479	.229
Return on Equity	.095	.247	.063	.462	.278	.348	.063	.426	.204
Percentage Returns:									
On Equity	2.3%	19.4%	2.1%	10.0%	(no equity)	9.2%	2.1%	21.3%	7.2%
On Total Investment	8.3%	8.4%	8.4%	8.4%	8.4%	8.6%	8.3%	8.7%	8.4%
On Valuation	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%

Appendix 5

TARIFF COMPUTATION

Allowing 10 Percent Return on Valuation—Actual Capital Structure

	AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Rate)	4.847	4.906	4.681	5.100	4.842	4.829	4.700	4.885	4.835
Less:									
Operating Costs	989.	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Taxes	.616	.775	.569	1.016	.809	.879	.574	.960	.728
Return on Equity	.548	.690	.507	.905	.720	.783	.511	.855	.648
Percentage Returns:									
On Equity	13.30%	54.25%	16.65%	19.54%	(no equity)	20.80%	17.32%	42.73%	23.00%
On Total Investment	10.34%	10.54%	10.50%	10.55%	10.54%	10.74%	10.42%	10.90%	10.50%
On Valuation	10%	10%	10%	10%	10%	10%	10%	10%	10%

APPENDIX D

INTERSTATE COMMERCE COMMISSION
Washington, D. C. 20423

(SERVICE DATE JUNE 29, 1977)

INVESTIGATION AND SUSPENSION DOCKET No. 9164
TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

NO. 36611

TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

June 29, 1977

CORRECTION NOTICE:

The order served in these proceedings on June 28, 1977, contained certain inadvertent omissions and typographical errors. Corrections should be made as follows:

Page 1

First sentence of text—add "Trans" before "Alaska Pipeline System."

Page 2

First paragraph, last sentence—delete, and substitute the following: "However, the question raised by the protests is whether there is reason to believe the proposed rates are not just and reasonable."

Page 3

Next-to-last paragraph, fifth line—after "could act as" insert "a deterrent or".

Page 6

Last paragraph, lines 12 through 18—Delete the three sentences beginning "Even if the carriers . . ." and ending ". . . for present purposes."

Page 8

Fifth paragraph, second line—delete "under the interim rate."

Fifth paragraph, sixth line—after "amounts collected" insert "under the interim rates or the proposed rates should they become effective".

Page 9

Third further ordering paragraph, line 11—change to read: "subject however, to the condition that the carriers keep account and that (1) the interim tariffs contain".

Appendix 1

Opposite Sohio Pipeline Company, change Effective Date to "June 30, 1977".

H. G. Homme, Jr.
Acting Secretary

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2412

BP Pipelines Inc., *Petitioner,*
v.
United States of America and the
Interstate Commerce Commission, *Respondents*

(Filed September 8, 1977)

Petition For Review Of An Order Of The Interstate Commerce Commission

Before Brown, Chief Judge, and Roney, Circuit Judge*.

By the Court:

BP Pipelines Inc. has petitioned for rehearing of our July 29, 1977 decision in Mobil Alaska Pipeline Co. v. United States, etc. [Nos. 77-2392, 77-2412, 77-2421 and 77-2437 at 5208]. We believe that the petition presents substantially nothing that the panel did not pass on in its prior decision. In view of the severe time problems involved in the operation of the Trans Alaska Pipeline and the parties' need to expedite Supreme Court review, the Court is of the opinion that nothing further would be accomplished by rehearing.

Therefore, to enable the parties to seek review before the Supreme Court without further delay, it is ordered that BP's Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is Denied.

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* Judge Godbold, a member of the panel, being absent from the United States, did not participate in this Order.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2421

EXXON PIPELINE COMPANY, *Petitioner*,
v.
UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION, *Respondents*

(FILED SEPTEMBER 8, 1977)

Petition For Review Of An Order Of The Interstate Commerce Commission

Before BROWN, Chief Judge, and RONEY, Circuit Judge*.

BY THE COURT:

Exxon Pipeline Company has moved for a stay of the mandate of this Court pending its application for a writ of certiorari to the Supreme Court for review of our decision of July 29, 1977 in Mobil Alaska Pipeline Co. v. United States, etc. [Nos. 77-2392, 77-2412, 77-2421 and 77-2437 at 5208]. Such a stay is unnecessary for timely petition for certiorari. Therefore, it is ordered that Exxon's motion for a stay of mandate is DENIED.

Exxon additionally has moved for a stay of the June 28, 1977 Interstate Commerce Commission Order pending application to the Supreme Court for a writ of certiorari for review of our July 29, 1977 decision. This motion seeks essentially the same relief previously sought before this panel as to which this Court has ruled on the merits. Because of the action of the panel, and for the reasons stated in the majority opinion, Exxon's motion for stay of the ICC order is also DENIED.

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* Judge Godbold, a member of the panel, being absent from the United States, did not participate in this Order.

APPENDIX G

INTERSTATE COMMERCE COMMISSION
Washington, D. C. 20423

(SERVICE DATE JUNE 13, 1977)

June 13, 1977

Supplemental Notice Concerning Filing of Protests and Replies To Initial Tariffs for the Trans-Alaska Pipeline System

SUBJECT: Revised schedule for filing of protests and replies; oral argument.

The effective dates of tariffs filed by Sohio Pipe Line Company, BP Pipelines Inc., and Mobil Alaska Pipeline Company have been postponed from June 20, 1977, to June 30, 1977. In view of these postponements, and in order to allow more time for preparation of protests and replies, the filing dates set forth in the Commission's notice of June 8, 1977, are hereby modified, and that notice should be disregarded.

It is now requested that protests to all of the tariffs now on file be submitted by Wednesday, June 15, 1977, and that replies to the protests be submitted by Wednesday, June 22, 1977.

In view of the importance of this matter, the Commission has determined that oral argument should be scheduled concerning the question of suspension or investigation of the proposed tariffs. Accordingly, oral argument will be held before the Commission on Monday, June 27, 1977, commencing at 9:30 a.m.

Parties desiring to participate in oral argument shall comply with rule 98 of the Commission's General Rules of Practice (49 CFR 1100.98), by submitting a request for an allotment of time on or before June 17, 1977.

This notice will be served upon each of the eight owning pipeline companies, upon the State of Alaska, upon the United States Department of Justice, and upon the Bureau of Investigation and Enforcement (ICC), and will also be posted in the Office of the Secretary, Interstate Commerce Commission, Washington, D. C., for the information of other interested persons.

H. G. Homme, Jr.,
Acting Secretary.

APPENDIX H

Statement of Donald A. Kaplan, Department of Justice, From Transcript of Oral Argument, Interstate Commerce Commission, Washington, D.C., June 27, 1977
(Transcript Pages 118-121)

• • • • • • • • • •

[119] I hardly imagine that the very powerful interests which hold their debt are going to permit these companies to forego the revenue or going to give them a vacation on their requirement to pay back that debt when tariffs are available which pay off all the expenses, including the debt, and return a generous amount on the equity; nor will the companies or the parent company stockholders permit the line to lie empty.

I can imagine the corporate derivative suits which might occur if they make that decision. But there is another factor, too. If we find on Friday, or next Monday, or whenever, that these carriers—that none of the carriers have decided to file new rates, that they all have, in fact, decided not to [120] operate TAPS, pending the determination of this proceeding, I submit that such a situation would raise serious questions under the Sherman Act.

[121] There is another potential problem——

Commissioner Brown: Would you expound on that just a little bit for me?

Mr. Kaplan: Well, in such failure or unanimous failure by tariff or filed tariffs or not even unanimous, but any failure, with the result of an agreement on the part of these owners not to use the line, in order to coerce the Commission into granting them higher rates or perhaps coerce Congress into—force Congress into perhaps taking jurisdiction away from the Commission, that would be an issue which could raise anti-trust consequences.

Now, of course, this is not an easy question, and one that could not be examined in this oral argument. There are a number of doctrines about dealing with public bodies.

But I submit that there would be questions raised which perhaps should be examined.

• • • • • • • • • •

APPENDIX I

Statement of Peter M. Shannon, Jr., Bureau of Investigations and Enforcement, Interstate Commerce Commission, From Transcript of Oral Argument, Interstate Commerce Commission, Washington, D.C., June 27, 1977 (Transcript Pages 145-147)

• • • • • • • • • •

[145] Mr. Shannon: Mr. Chairman and Members of the Commission, this morning Commissioner Christian asked the attorney for the State of Alaska—I believe two other Commissioners, Commissioners Hardin and Murphy, during the course of oral argument, have alluded to the same type of question—as I understand your question Commissioner Christian, you asked what if the Commission suspends without prejudice to filing rates, lower rates, and what if the oil companies do not file lower rates—what then could the Commission do at that time?

Well, I suggest that there are three avenues of approach that the Commission might want to use, might choose to use. Before describing, very briefly, these three approaches, I'd [146] like to refer the Commission to the fact that four oil companies, Sohio, Exxon, ARCO, and I believe Phillips, are already common carriers, subject to the jurisdiction of this Commission.

I also have been informed that the other Respondents, save BP, have interest in oil pipelines through affiliates. And I know that all the Respondents have voluntarily submitted themselves to the jurisdiction of this Commission by filing the instant tariffs.

With this as a background, I'd like then to refer to Section 14 of the Act. It states as follows, "it shall be the duty of every common carrier, subject to this part, to provide and furnish transportation upon reasonable request therefor.

I submit on behalf of the Bureau of Investigations and Enforcement that because these oil companies are com-

mon carriers, subject to the jurisdiction of this Commission, that they are obliged to transport the oil in question.

And should they, hypothetically, refuse to come before the Commission with lower rates, assuming there is suspension without prejudice, then the Bureau of Investigations and Enforcement would proceed immediately in Federal Court to enjoin them from their failure to perform their duty as common carriers, that is, to transport the oil.

This is the first avenue of approach.

The second avenue would be for the Commission to decide but there are possible approaches.

[147] The Commission has been charged under the preamble to the Act of the National Transportation Policy referred to by the attorney from the Department of Justice—the Commission is charged with the duty to encourage the establishment and maintenance of reasonable charges for transportation services.

And it is my informed opinion that the Commission itself could proceed in the Federal Court and ask for an immediate and permanent injunction against the oil companies for failure to perform their duty as common carriers.

A third approach, which is also for the Commission to decide, is that this Commission, I believe, assuming failure to submit reasonable rates, reasonable tariffs—this Commission itself could order the common carriers to perform their duty to transport the oil under reasonable rates.

And if there is failure on the part of the oil companies to do so, then, again, I believe the Commission could proceed immediately in the Federal Court.

We would provide our services of this Bureau, hopefully with the Department of Justice, alone if necessary, to enforce the Commission's order.

• • • • • • • • • •

STATUTORY APPENDIX

STATUTORY APPENDIX

Interstate Commerce Act

§ 1. Regulation in general; car service; alteration of line

Carriers subject to regulation

(1) The provisions of this chapter shall apply to common carriers engaged in—

• • •

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—49 U.S.C. § 1(1)(b)(1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, Ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, Ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, Ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543).

• • •

Definitions.

(3) (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; . . . 49 U.S.C. § 1(3)(a)(1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, Ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, Ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, Ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 2 (a), (b), 54 Stat. 899).

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Just and reasonable charges; applicability; criteria for determination

(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this part. 49 U.S.C. § 1(5)(a)(1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, Ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, Ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, Ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 2(d), 54 Stat. 899; Act of Aug. 2, 1949, Ch. 379, § 1, 63 Stat. 485; Act of Feb. 5, 1976, Pub. L. 94-210, Tit. II, § 202(a), (b), 90 Stat. 34, 35).

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§ 6. Schedules and statements of rates, etc., joint rail and water transportation

Schedule of rates, fares, and charges; filing and posting.

(1) Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. . . . The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter. 49 U.S.C. § 6(1) (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, Ch. 382, § 1,

25 Stat. 855; Act of June 29, 1906, Ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, Ch. 91, § 409, 41 Stat. 483; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543).

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Change in rates, fares, etc.; notice required; simplification of schedules.

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, . . . 49 U.S.C. § 6(3) (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, Ch. 382, § 1, 25 Stat. 855; Act of June 29, 1906, Ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, Ch. 91, §§ 409, 410, 41 Stat. 483).

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Transportation without filing and publishing rates forbidden; rebates; privileges.

(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; . . . 49 U.S.C. § 6(7) (1976) (originally enacted as Interstate Com-

merce Act of 1887, Ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, Ch. 382, § 1, 25 Stat. 855; Act of June 29, 1906, Ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, Ch. 91, § 411, 41 Stat. 483; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543).

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§ 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. 49 U.S.C. § 8 (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 8, 24 Stat. 332; *as amended by* Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543).

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§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

Commission empowered to determine and prescribe rates, classifications, etc.

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever

demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed. 49 U.S.C. § 15(1) (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 15, 24 Stat. 384, *as amended by* Act of June 29, 1906, Ch. 3591, § 4, 34 Stat. 589; Act of June 18, 1910, Ch. 309, § 12, 36 Stat. 551; Act of Feb. 28, 1920, Ch. 91, § 418, 41 Stat. 484; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 10(a), 54 Stat. 911).

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Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroad subject to chapter.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing

and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as posible. This paragraph shall not apply to common carriers by railroad subject to this chapter. 49 U.S.C. § 15(7) (1976) (originally enacted as Mann-Elkins Act of 1910, Ch. 309, § 12, 36 Stat. 551, *amending* Act of Feb. 4, 1887, Ch. 104, pt. I, § 15, 24 Stat. 384, *and as amended by* Act of Feb. 28, 1920, Ch. 91, § 418, 41 Stat. 484; Act of Mar. 4, 1927, Ch. 510, § 2, 44 Stat. 1447; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 10(c), 54 Stat. 912; Act of Feb. 5, 1976, Pub. L. No. 94-210, Tit. II, § 202(e)(1), 90 Stat. 36).

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Trans-Alaska Pipeline Authorization Act

§ 1. Congressional findings and declaration

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

(d) A supplemental pipeline to connect the North Slope with a trans-Canada pipeline may be needed later and it should be studied now, but it should not be regarded as an alternative for a trans-Alaska pipeline that does not traverse a foreign country. 43 U.S.C. § 1651 (1976) (Act of Nov. 16, 1973, Pub. L. 93-153, Tit. II, § 202, 87 Stat. 584).

§ 2. Authorizations for construction—Congressional declaration of purpose

(a) The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further ad-

ministrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto. 43 U.S.C. § 1652(a) (1976) (Act of Nov. 16, 1973, Pub. L. 93-153, Tit. II, § 203, 87 Stat. 584).

CERTIFICATE OF SERVICE

I hereby certify that on this 22d day of September, 1977, three copies of the annexed Petition for Writ of Certiorari were served by hand upon all counsel of record below and the Solicitor General of the United States.

/s/ ANDREW J. KILCARR
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

Supreme Court, U. S.
FILED
JAN 12 1978
MICHAEL RODAK, JR., CLERK

APPENDIX
Vol. I
Pages 1a to 595a

In The

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. and ARCO PIPE LINE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED SEPTEMBER 22, OCTOBER 12, OCTOBER 25, 1977

CERTIORARI GRANTED NOVEMBER 28, 1977

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7/ 6/77	Petition for Review of Order of ICC—*Mobil Alaska*
7/ 6/77	Flg. Petitioner's Application for Temporary Restraining Order—*Mobil Alaska*
7/ 6/77	Flg. Petitioner's Application for Interlocutory Injunction—*Mobil Alaska*
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7/11/77	Flg. Petitioner's Motion to Stay, Restrain and Suspend Order of I.C.C.—*BP Pipelines*
7/11/77	Flg. Petitioner's Memorandum in Support of Their Motion to Stay, Restrain and Suspend Order of I.C.C.—*BP Pipelines*
7/12/77	Flg. Motion of Exxon Pipeline Co. for Expedited Consideration or, in the Alternative, for a Stay Pending Review, a Memorandum in Support and Appendices to Memorandum in Support—*Exxon Pipeline*
7/12/77	Flg. Motion of State of Alaska for Leave to Appear as Party Pursuant to 28 U.S.C. § 2323, and § 2348, and Rule 15 of FRAP—*Mobil Alaska*
7/12/77	Flg. Reply of I.C.C. in Opposition to Petitioner's Applications for Interlocutory Injunction and Temporary Restraining Order—*Mobil Alaska*

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7/13/77	Petition for Review of Order of ICC—*ARCO Pipe Line*
7/13/77	Flg. Reply of Respondent, I.C.C., in Opposition to Petitioner's Motion to Stay, Restrain and Suspend Order of I.C.C.—*BP Pipelines*
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7/14/77	Motion for Injunction [with Memorandum in Support] of ARCO Pipe Line Co.—*ARCO Pipe Line*
7/14/77	Flg. Motion of Respondent, U.S.A., for Consolidation of Nos. 77-2412, 77-2421 and 77-2437 and to Dismiss Petitions —*all cases*
7/14/77	Flg. Telegram Confirmation of Interstate Commerce Commission as Requested by the Ct. with respect to earliest date projected for arrival of oil through pipeline to Valdez—*Mobil Alaska*
7/14/77	Flg. Telegram Confirmation of Mobil Alaska Pipeline Co. as Requested by Ct. with respect to earliest date projected for arrival of oil through pipeline to Valdez—*Mobil Alaska*
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7/14/77 Flg. Telegram Confirmation of ARCO Pipe Line Co. as Requested by Ct. with respect to earliest date projected for arrival of oil through pipeline to Valdez—*ARCO Pipe Line*

7/15/77 Flg. Memorandum of U.S. in Support of Their Motion to Dismiss, also fld. in Nos. 77-2412, 77-2421, and 77-2437—*all cases*

7/18/77 Flg. Mobil Alaska's Reply Memorandum in Support of Application for Temporary Restraining Order and Interlocutory Injunction and Response to Motion to Dismiss. (Copies were mailed directly to Judges' home stations.)—*Mobil Alaska*

7/18/77 Flg. Motion of Amerada Hess for Entry of Appearance as a Party—*Mobil Alaska*

7/18/77 Flg. Exxon's Reply to Motion of USA for Consolidation and Motion to Dismiss (Copies sent directly to Judges' home stations.)—*Exxon Pipeline*

7/19/77 Flg. Reply of ICC in Opposition to ARCO's Application for Interlocutory Injunction, and Exxon's Motion for Expedited Consideration (Copies sent directly to judges' home stations.)—*ARCO Pipe Line and Exxon Pipeline*

7/19/77 Flg. State of Alaska's Supplemental Memorandum in Opposition to Application for TRO and Interlocutory Injunction and in Support of Motion to Dismiss filed by Respondent U.S. (Copies sent directly to home stations.)—*all cases*

7/19/77 Minute Entry: Oral arguments were held in Houston, Texas today on Cases 77-2392, 77-2412, 77-2421 and 77-2437 on the motion to dismiss, temporary restraining order and injunctive relief. The Court granted from the bench the motion to consolidate these cases as well as the motions of all parties to intervene. The motion to dismiss and temporary restraining order and injunctive relief motions were taken with the case. The Panel consisted of Judges Brown, Godbold and Roney. Arguing for Petitioners were: 1) Andrew J. Kilcarr (Mobil Alaska); 2) Richard

DATE

J. Flynn (Exxon); 3) Marvin Schwartz (BP) and 4) Robert Jordan who handled the rebuttal (for ARCO). Arguing for Respondents were: 1) Charles H. White, Jr. (ICC); 2) Donald A. Kaplan (D. of Justice); 3) Avrum Gross (Atty. Gen., Alaska) and 3) Yale Lewis (Arctic Slope)—*Mobil Alaska*

7/22/77 Flg. Suppl. Memorandum of State of Alaska in Opposition to Memorandum in Support of Petition fld. by Intervenor, Amerada Hess Pipeline Corp.—*all cases*

7/25/77 Flg. Motion of Union Alaska Pipeline Company to Appear as a Party—*Mobil Alaska and Exxon Pipeline*

7/29/77 Opinion of Court of Appeals dismissing cases: all motions to intervene granted; all motions for stay, suspension, injunction, etc. denied—*all cases*

8/15/77 Petition for Rehearing En Banc—*BP Pipelines*

8/17/77 Received certified list of all documents submitted to ICC—*all cases*

8/19/77 Flg. Petitioner's Motion for Stay of Mandate Pending Application for Certiorari—*Exxon Pipeline*

8/19/77 Flg. Petitioner's Motion for Stay of Order of Interstate Commerce Commission pending application for certiorari—*Exxon Pipeline*

8/25/77 Flg. Response of Respondent, I.C.C., in Opposition to Motion for Stay of Order of I.C.C. pending application for certiorari—*Exxon Pipeline*

8/29/77 Flg. Memorandum of Respondent, U.S.A., in Opposition to Motion for Stay—*Exxon Pipeline*

9/ 1/77 Flg. Response of State of Alaska in Opposition to Motions of Exxon Pipeline Co. for Stay of Mandate and Stay of Order of I.C.C.—*Exxon Pipeline*

9/ 8/77 Flg. Order Denying Exxon's Motion for Stay of Mandate and Denying Exxon's Motion for Stay of ICC's order. (JRB/PHR)—*Exxon Pipeline*

9/ 8/77 Flg. Order Denying BP's Petition for Rehearing and Denying Petition for Rehearing en banc. (JRB/PHR)—*BP Pipelines*

DATE	
9/ 8/77	Judgment Issued as Mandate—*all cases*
9/26/77	Notice of Flg. of Cert. Pet. on 9-22-77—*Mobil Alaska and Exxon Pipeline*
10/17/77	Notice of Flg. of Cert. Pet. on 10-12-77—*BP Pipelines*
10/26/77	Flg. Copy of Supreme Ct. Order staying order of I.C.C. pending final disposition of petition for certiorari in Supreme Ct.—*Mobil Alaska*
11/ 1/77	Notice of Flg. of Cert. Pet. on 10-25-77—*ARCO Pipe Line*
12/ 2/77	Order of S.C. granted [certiorari] 11-28-77—*all cases*

INTERSTATE COMMERCE COMMISSION

Docket 36611

Title/Substance of Document

6/2/77 1. NOTICE: To Trans-Alaska Pipeline System owners. Requesting prompt filing of data concerning proposed rate levels and each company is asked to send a copy of its data submittal simultaneously to the State of Alaska.
[By] ROBERT L. OSWALD, Secretary (1 p.)

6/8/77 2. NOTICE: Requesting that any protests to the tariffs be filed by 6/13/77, and that replies to protests be submitted by 6/15/77.
[By] ROBERT L. OSWALD, Secretary (2 pp.)

6/13/77 3. SUPPLEMENTAL NOTICE: Advising the effective dates of tariffs filed by Sohio Pipe Line Company, BP Pipelines, Inc., and Mobil Alaska Pipeline Company have been postponed from 6/20/77 to 6/30/77, in view of these postponements, the filing dates set forth in the notice in item next above are modified, and that notice should be disregarded and requesting that protests to all of the tariffs now on file be submitted 6/15/77, and replies by 6/22/77. Parties desiring to participate in

Date

oral argument shall comply with rule 98 of the Commission's General Rules of Practice, by submitting a request for an allotment of time on or before 6/17/77.
[By] H. G. HOMME, JR., Acting Secretary (2 pp.)

6/14/77 4. PETITION: In aid of ICC Jurisdiction.
[By] STATE OF ALASKA
(by J. M. Cleary) (6 pp.)

6/15/77 5. REPLY: To the petition in item next above.
[By] SOHIO PIPE LINE COMPANY (4 pp.)

6/15/77 6. PROTEST/COMPLAINT
[By] STATE OF ALASKA
(by J. M. Cleary) (99 pp.)

6/15/77 7. PROTEST: And PETITION for Suspension and Investigation.
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT, I.C.C.
(by E. D. Greenberg) (104 pp.)

6/15/77 8. PRELIMINARY STATEMENT
[By] TERRY F. LENZNER (representing Alaska Pipeline Commission) (267 pp.)

6/15/77 9. PETITION: AND COMPLAINT for suspension of initial rates and rules for transportation of petroleum via the Trans Alaska Pipeline System (TAPS) from Prudhoe Bay, Alaska, to Valdez, Alaska, and for an investigation thereof.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (30 pp.)

6/15/77 10. PROTEST: And PETITION for suspension.
[By] UNITED STATES DEPARTMENT OF JUSTICE
(by P. J. Tomao) (29 pp.)

6/15/77 11. LETTER: Transmitting data, they believe, that the rate of earnings estimates will be produced by their initial tariff will not exceed any lawful criterion of the reasonableness of such earnings.
[By] SOHIO PIPE LINE COMPANY
(by J. T. Boltacz) (8 pp.)

Date

6/15/77 12. LETTER: Transmitting the basis for the computation of their tariff rate issued on 6/15/77.
[By] UNION ALASKA PIPELINE COMPANY
(by D. M. Schwartz) (4 pp.)

6/16/77 13. SUPPLEMENTAL PETITION: And COMPLAINT to the petition and complaint in item #13 above.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (4 pp.)

6/17/77 14. ORDER: That the petition in item #4 above is *denied.*
[By] THE COMMISSION (Commissioners Murphy, Hardin, and Christian not participating) (1 p.)

6/17/77 15. ORDER: That an investigation is instituted; that the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said schedules under the IC Act; and that the carriers parties to the schedules are made respondents to this proceeding.
[By] THE COMMISSION (Commissioners Murphy, Hardin, and Christian not participating) (2 pp.)

[Requests for oral argument time omitted]

6/17/77 21. Response to the notice in item #1 above.
[By] BP PIPELINES, INC.
(by D. A. Lucas) (23 pp.)

6/20/77 22. PROTEST: And PETITION for suspension and investigation.
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT
(by E. D. Greenberg) (3 pp.)

6/21/77 23. LETTER: Transmitting a computation of the elements making up the determination of their proposed rate level.
[By] AMERADA HESS PIPELINE CORPORATION
(by A. S. Tabor, Jr.) (10 pp.)

6/22/77 24. NOTICE: Advising time allotments for Pipeline Companies and the protestants.
[By] H. G. HOMME, JR., Acting Secretary (2 pp.)

Date

6/22/77 25. REPLY: To the protests in item #'s 6, 7, 9, 10 and 13 above.
[By] MOBIL ALASKA PIPELINE COMPANY
(by A. J. Kilcarr) (67 pp.)

6/22/77 26. REPLY: To the protests in item #'s 6, 9 and 10 above.
[By] EXXON PIPELINE COMPANY
(by R. J. Flynn) (219 pp.)

6/22/77 27. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] UNION ALASKA PIPELINE COMPANY
(by D. M. Schwartz) (25 pp.)

6/22/77 28. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] PHILLIPS ALASKA PIPELINE CORPORATION
(by R. M. Shibley) (11 pp.)

6/22/77 29. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] SOHIO PIPE LINE COMPANY
(by C. J. Lansdale) (34 pp.)

6/22/77 30. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] AMERADA HESS PIPELINE CORPORATION
(by R. Moody, Jr.) (25 pp.)

6/23/77 31. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] BP PIPELINES, INC.
(by J. Vickrey) (21 pp.)

6/23/77 32. SECOND SUPPLEMENT: To petition and complaint in item #'s 9 and 13 above.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (8 pp.)

6/23/77 33. STATEMENT
[By] ALASKA PIPELINE SYSTEM
(by B. E. Benjamin) (13 pp.)

6/23/77 36. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] ARCO PIPELINE COMPANY
(by R. E. Jordan, III) (198 pp.)

Date

6/27/77 37. LETTER: Addressed to Douglas Baldwin, requesting the Commission to reconsider its decision to close the special meeting scheduled for 6/28/77.
[By] UNITED PRESS INTERNATIONAL
(by G. Dillman) (2 pp.)

6/27/77 38. LETTER: Addressed to H. Gordon Homme, requesting. . . .
[By] DIANE B. COHN (on behalf of Edward K. DeLong, U.P.I.) (2 pp.)

6/27/77 39. LETTER: Addressed to A. Daniel O'Neal, requesting. . . .
[By] COMMON CAUSE
(by D. Cohen) (1 p.)

6/27/77 40. ORAL ARGUMENT: For testimony adduced at the oral argument held 6/27/77, see Volume 2 on page 9 herein.
[By] THE COMMISSION (208 pp.)

6/27/77 41. MOTION: For leave to file memorandum in reply to the responses of the carriers.
[By] THE DEPARTMENT OF JUSTICE
(by D. A. Kaplan) (9 pp.)

6/27/77 43. ORAL ARGUMENT EXHIBITS
[By] STATE OF ALASKA
(by J. M. Cleary) (10 pp.)

6/27/77 44. ORAL ARGUMENT EXHIBITS
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT
(by E. D. Greenberg) (14 pp.)

6/27/77 TRANSCRIPT OF ORAL ARGUMENT: NO EXHIBITS IN EVIDENCE
(BY THE COMMISSION) (206 pp.)

7/1/77 45. THIRD SUPPLEMENTAL PETITION: And COMPLAINT.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by J. T. French) (4 pp.)

7/5/77 46. CONFERENCE: For testimony adduced at the conference held 7/5/77, see Volume 2 on page 9 herein.
(BY THE COMMISSION) (19 pp.)

Date

7/12/77 47. PROTEST/COMPLAINT: Seeking suspension and investigation.
[By] STATE OF ALASKA
(by J. M. Cleary) (10 pp.)

[End of Docket Entries in No. 36611 certified by the Secretary]

INTERSTATE COMMERCE COMMISSION

Docket I & S 9164

6/28/77 1. ORDER: That the operation of specified schedules is suspended, that the use thereof in interstate or foreign commerce be deferred from 6/30/77, and to and including 1/29/78, except as to I.C.C. 2, published by Amerada Hess, which bears a July 1 effective date and the operation of which is suspended to 1/31/78, unless ordered by this Commission; that an investigation is instituted into and concerning the lawfulness of the rates contained in the suspended schedules, as well as the interim schedules authorized to be filed, pursuant to section 15(1) and section 15(7), with a view to making such findings and orders in the premises as the facts and circumstances shall warrant; that the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said rates under the IC Act; that the named carriers are authorized to file, upon not less than one day's notice, interim rates not exceeding specified amounts subject, however, to specified conditions; and that the said carriers are made respondents to this proceeding. (This order also embraces No. 36611).
BY THE COMMISSION (Commissioner Brown approves the order except insofar as it denied the motion of the Department of Justice for leave to file a response to the carrier's responses) (21 pp.)

7/8/77 3. PETITION: For Reconsideration.
[By] EXXON PIPELINE COMPANY
(by R. J. Flynn) (20 pp.)

Date

7/15/77 8. NOTICE: A court action was instituted on or about 7/6/77, involving these proceedings before the U.S. Court of Appeals for the Fifth Circuit.
[By] H. G. HOMME, JR., Acting Secretary (1 p.)

7/15/77 9. NOTICE: A court action . . . on or about 7/8/77. . . .

7/19/77 10. NOTICE: A court action . . . on or about 7/11/77. . . .

7/26/77 11. NOTICE: A court action . . . on or about 7/13/77. . . .

[End of Docket Entries in No. I & S 9164 certified by Secretary]

Interstate Commerce Commission Notice to TAPS Owners Requesting Tariff Data, June 2, 1977.

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

June 2, 1977

NOTICE TO TRANS-ALASKA PIPELINE SYSTEM OWNERS

SUBJECT: Request for prompt filing of data concerning proposed rate levels.

Tariffs for transportation of petroleum through the Trans-Alaska Pipeline System have been filed by Arco Pipe Line Company and Amerada Hess Pipeline Company, with effective dates of June 30, 1977, and July 1, 1977, respectively. Tariffs of the other six owning companies are expected to be filed shortly, in response to the Commission's request that such tariffs be filed on 30 days' notice.

In order for the Commission to make the best use of the notice period, it desires to receive the basis of computation of the proposed rate levels at the earliest possible moment. Accordingly, each owning company is requested to submit a computation of the elements making up the determination of its proposed rate level immediately or as soon as possible, without waiting for the filing of protests to its tariff. Such submittals will not prejudice in any way the companies' rights to submit replies to any protests, nor will it preclude the use of updated figures in such replies.

In addition, because of the interest of the State of Alaska in the tariff levels, each company is asked to send a copy of its data submittal simultaneously to the State of Alaska.

The companies' cooperation will help assure timely initial consideration of the tariffs, and will be greatly appreciated by the Commission.

ROBERT L. OSWALD
Secretary

Interstate Commerce Commission Supplemental Notice re Schedule for Filing of Protests and Replies, June 13, 1977.

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

June 13, 1977

SUPPLEMENTAL NOTICE CONCERNING FILING OF PROTESTS AND REPLIES TO INITIAL TARIFFS FOR THE TRANS-ALASKA PIPELINE SYSTEM

SUBJECT: Revised schedule for filing of protests and replies; oral argument.

The effective dates of tariffs filed by Sohio Pipe Line Company, BP Pipelines Inc., and Mobil Alaska Pipeline Company have been postponed from June 20, 1977, to June 30, 1977. In view of these postponements, and in order to allow more time for preparation of protests and replies, the filing dates set forth in the Commission's notice of June 8, 1977, are hereby modified, and that notice should be disregarded.

It is now requested that protests to all of the tariffs now on file be submitted by Wednesday, June 15, 1977, and that replies to the protests be submitted by Wednesday, June 22, 1977.

In view of the importance of this matter, the Commission has determined that oral argument should be scheduled concerning the question of suspension or investigation of the proposed tariffs. Accordingly, oral argument will be held before the Commission on Monday, June 27, 1977, commencing at 9:30 a.m.

Parties desiring to participate in oral argument shall comply with rule 98 of the Commission's General Rules of

Interstate Commerce Commission Supplemental Notice re Schedule for Filing of Protests and Replies, June 13, 1977.

Practice (49 CFR 1100.98), by submitting a request for an allotment of time on or before June 17, 1977.

This notice will be served upon each of the eight owning pipeline companies, upon the State of Alaska, upon the United States Department of Justice, and upon the Bureau of Investigation and Enforcement (ICC), and will also be posted in the Office of the Secretary, Interstate Commerce Commission, Washington, D.C., for the information of other interested persons.

H. G. HOMME, JR.
Acting Secretary

Protest of the State of Alaska for Suspension and Investigation of Initial Rates and Tariff Provisions via the Trans-Alaska Pipeline System Carriers, June 15, 1977.

[Caption Omitted in Printing]

THIS REQUIRES EXPEDITED HANDLING
BEFORE THE
INTERSTATE COMMERCE COMMISSION

I.C.C. Docket No. _____

Trans Alaska Pipeline System—Initial Rates

PROTEST OF THE STATE OF ALASKA SEEKING THE SUSPENSION AND INVESTIGATION OF INITIAL RATES AND TARIFF PROVISIONS FOR THE TRANSPORTATION OF PETROLEUM VIA THE TRANS ALASKA PIPELINE SYSTEM (TAPS) CARRIERS FROM PRUDHOE BAY, ALASKA TO VALDEZ TERMINAL, VALDEZ, ALASKA AS PUBLISHED EFFECTIVE JUNE 20, 30 AND JULY 1, 1977

Comes now the State of Alaska and files this its Protest/Complaint seeking the suspension and the institution of an immediate formal investigation of the rates and rules published by Trans Alaska Pipeline System (TAPS) carriers for the transportation of petroleum from Prudhoe Bay, Alaska to Valdez Terminal, Valdez, Alaska via TAPS. The protested initial tariffs as to which suspension is sought are shown in the following table which also shows the total annual revenues which would be generated by each company at an overall average volume of 1.2 million barrels per day.

Protest of the State of Alaska Seeking Suspension.

TABLE #1

Protested TAPS Tariff Rates and Annual Revenues

Carrier	% Ownership TAPS	Proposed Tariff	Dates Pub.	Dates Eff.	Annual Barrels (1.2 MMB/D)	Annual Rev.($)
1. Amerada Hess	1.5	$6.44	6/1	7/1	6,570,000	42,310,800
2. ARCO	21.0	6.04	5/31	6/30	91,980,000	555,559,200
3. BP	15.84	6.35	6/3	6/20*	69,379,200	440,557,920
4. Exxon	20.0	6.27	6/8	6/30	87,600,000	549,252,000
5. Mobil	5.0	6.31	6/10	6/20*	21,900.000	138,189,000
6. Phillips	1.66	-	-	-	7,270,800	-
7. Sohio	33.34	6.16	6/3	6/20*	146,029,200	899,539,870
8. Union Alaska	1.66	6.09	6/15	6/30	7,270,800	44,279,172
TOTAL	100.0				438,000,000	
SubTotal (7 pipelines)	98.34%	$6.20 avg.			430,729,200	$2,669,679,962
Projected Total	100.0%	$6.20 avg.			438,000,000	$2,714,744,724

* Postponed to June 30, 1977

The average rate published by seven carriers on 98.34% of the volume is seen to be $6.20 per barrel.

This protest seeks the suspension of these initial rates without prejudice to the filing of lower rates on one day notice pursuant to Special Permission of the Commission, which lower rates would be consistent with the standards of reasonableness urged herein and which would be consistent with the stated grounds on which the Commission believes that the initial tariffs would, if permitted to become effective, result in rates and charges which would be un-

just and unreasonable in violation of Section 1(5), unjustly discriminatory in violation of Section 2 and unduly preferential and prejudicial in violation of Section 3(1) of the Interstate Commerce Act and constitute a destructive competitive practice and otherwise operate in contravention of the National Transportation Policy.

The State of Alaska, consistent with the position espoused in this protest regarding the need for a suspension and the standards which should be applicable to a determination of the maximum rates which should be permitted to become effective, subject to continuing investigation and refund provision, would not object to tariffs being filed on one day notice not exceeding the following:

Carrier	Published Rate	Maximum Interim Rate*
1. Amerada Hess	$6.44	—
2. ARCO	6.04	$3.74
3. BP	6.35	4.42
4. Exxon	6.27	3.80
5. Mobil	6.31	3.59
6. Phillips	—	—
7. Sohio	6.16	4.04
8. Union Alaska	6.09	3.85

* Subject to refund provisions and continuing investigation.

This position stated in this Protest does not waive the rights of the State of Alaska to have the Commission ultimately determine a lower level of just and reasonable charges from the initial effective date. The State of Alaska does not waive its rights to pursue all arguments challenging the lawfulness of the initial tariffs. The purpose of this protest/complaint is to obtain the suspension of those

tariffs to the extent that they clearly exceed a maximum reasonable level. Maximum reasonable revenues for the TAPS carriers can encompass no more than a recovery of reasonable and prudent operating expenses, including reasonable depreciation charges and Alaska Pipeline taxes, plus reasonable interest expenses of the pipeline, a reasonable accrual for "removal costs", and a reasonable return on the equity shareholders' proportionate share of the reasonable and prudent investment dedicated to public service.

SUMMARY OF ARGUMENT

The initial TAPS tariffs permitted to become effective should not be one penny higher than absolutely necessary. The Interstate Commerce Commission is under a clear Congressional mandate, pursuant to the National Transportation Policy[1] and the Rule of Ratemaking[2] to promote safe, adequate, economical and efficient service and foster sound, economic conditions in transportation, to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages or unfair or destructive competitive practices all to the end of developing, coordinating, and preserving a national transportation system adequate to meet the needs of the commerce of the United States. Under the Rule of Ratemaking the Commission is specifically required to give due consideration to the effect of rates on the movement of traffic and to the need in the public interest of adequate and efficient transportation service at the lowest cost consistent with the furnishing of such services. In analyzing the needs of the TAPS carriers for revenues such determinations must be made

1. 49 U.S.C., preceding Section 1
2. 49 U.S.C. § 15a(2)

in consideration of "honest, economical and efficient management". The foregoing standards are to guide and control the Commission's deliberations in determining what should be the just and reasonable rates to permit to become effective for the transportation of petroleum via the TransAlaska Pipeline System.

1. *Construction Costs*

The construction costs for TAPS constitute the first area in which there is a grave obligation upon the Commission to see that no tariffs are premised on other than expenditures required to provide the service at the lowest cost under honest, economical and efficient management. The Commission is to be commended for undertaking its own fiscal and management audit of the TAPS construction expenditures.[1] On November 22, 1976, the Alaska Pipeline Commission initiated an investigation into the costs associated with the design and construction of the TransAlaska Pipeline System. The Alaska Pipeline Commission (APC) has a twofold interest and responsibility with respect to the costs of construction and design of TAPS: first, the Commission regulates the tariff charge for the intrastate transportation of oil in the TAPS system; and second, the Alaska Pipeline Commission is statutorily required to assist the Attorney General of the State of Alaska in intervening on behalf of the State of Alaska in any Interstate Commerce Commission proceedings regarding the interstate tariff charged by the TAPS carriers. To conduct an investigation into the design and construction expenditures for the TAPS system the APC retained Terry F. Lenzner as its Special Counsel in conducting the investi-

1. Contract ICC 76-10 with Touche Ross & Co. and letter contract I.C.C.-L-771.

gation and also retained the services of several independent consultants[1] to assist the special counsel. A summary of the results of that investigation to date entitled "Preliminary Statement of Terry F. Lenzner", accompanies this protest as supporting documentation for this serious challenge made by Alaska regarding the allowable nature of the overall TAPS' claimed expenditures for construction costs.

Despite obstacles and constraints placed by Alyeska and the owning TAPS carriers in the path of the investigation conducted by the Special Counsel, as described by the Special Counsel in his statement, the evidence obtained, in the Special Counsel's view,

> "reveals a project characterized by an unnecessary duplication of management structure and responsibility, ineffective utilization of labor and equipment, an inexcusable absence of effective cost control procedures and incentives or other evidence of concern about excessive costs, a refusal to authorize adequate planning and design prior to construction, and an

1. The independent consultants assisting Mr. Lenzner are:
   1. Dr. Robert Lind: Professor, Graduate School of Business and Public Administration and Director, Energy Policy Studies Unit, Cornell University; Ithaca, New York.
   2. *Aerospace Corporation:* Engineering and Economic consultants with extensive experience in Alaskan transportation, energy, and environmental matters; Los Angeles, California.
   3. *VHS Associates:* Consultants in cost estimating and construction management of pipelines, terminals, and comparable facilities; San Rafael, California.
   4. *Resource Planning Associates:* Economic and management consultants with extensive experience in issues relating to the oil and gas industry; Cambridge, Massachusetts.

> inexplicable failure to establish information and cost control systems essential for an efficient construction effort."

The TAPS construction project has been plagued by monumental cost overruns. Originally to cost less than $900,000,000, the final construction cost estimate escalated to $4 billion in early 1974, to $6.4 billion in 1975 and to today's projection of $8 billion (without capitalized interest costs). As stated by Mr. Lenzner:

> "While some of the ten-fold increase can be attributed to factors beyond the control of the TAPS owner companies and their agents, it seems clear that hundreds of millions of dollars were wasted as a result of mis-management and an organizational lack of concern about economy or efficiency." (Lenzner, pp. 4-5)

As this Protest is being prepared, the Special Counsel and his associates are still continuing to develop the documentation in support of these conclusions. In providing specific documentation in support of the conclusions certain caveats are to be kept in mind as pointed out by Mr. Lenzner:

> "First, because a 'cost-plus' mentality appears to have pervaded nearly every aspect of the project, many excessive costs were incurred in a manner rendering them difficult to verify or to quantify . . . Second, while it is necessary to categorize the evidence, a construction project consists of many parts which are intricately inter-related. Thus every im-

1. Preliminary Statement of Terry F. Lenzner, Special Counsel, Alaska Pipeline Commission, p. 4, hereinafter Lenzner.

> prudent decision had not only a primary impact upon project costs, but also numerous 'ripple' effects beyond a given cost category which each contributed to the sum of excessive expenditures." (Lenzner, p. 5)

Mr. Lenzner's statement provides more detail regarding the excessive costs resulting from a general failure to meet the mandate for "honest, economical and efficient management." This evidence derived by the special investigation is categorized in the following areas: (1) Overall TAPS organization and structure; (2) Internal Controls; (3) Construction equipment, spare parts and inventory control; (4) Labor productivity; (5) Support services; (6) Above-ground design and construction; (7) Welding; (8) River crossings; (9) Section 5; (10) Valdez terminal.

Alaska submits that the results of a complete investigation by the Interstate Commerce Commission will fully support an ultimate conclusion, based on the record, that there were excessive costs incurred resulting from the problems outlined in the summary of the Lenzner investigation to date. Alaska submits that the result of the complete investigation will disclose and quantify *hundreds of millions of dollars* that were expended in a fashion that cannot be described as a prudent investment in used and useful carrier property. Nor can such expenditures be described as having been made under "honest, economical or efficient management."

Alaska believes that the ultimate investigation will justify the disallowance of hundreds of millions of dollars of expenditures claimed by TAPS' owners and their agent, Alyeska Pipeline Service Company (Alyeska). Alaska urges the Commission to take into account the facts and analysis contained in the Lenzner Report to disallow, pending completion of a full investigation, a substantial portion

of the costs upon which the carriers have based their tariffs. For purposes of analysis, all the calculations the State presented in this protest assume that the expenditures and projected operating expenses claimed by the carriers[1] will be allowed. One possible exception to the rule that this protest by the State of Alaska has generally accepted as valid and accurate, for purposes of analysis, the numbers submitted by the pipelines, is the figure for annual expenses alleged to be incurred for removal costs based on an estimate by Alyeska of $1.049 billion in 1977 dollars for removal cost at retirement date.[2]

2. *Interest During Construction*

As part of the claimed original cost of TAPS, the pipelines are claiming an allowance for the capitalization of interest during construction. The apparent estimates of the amount of capitalized interest during construction vary considerably. There had been general references forthcoming from Alyeska that interest during construction would be approximately $1.3 billion. No documentation

1. Letters from the various pipelines to the I.C.C. responsive to the I.C.C. request dated May 11, 1977 as follows: (1) Amerada Hess Corporation, June 1, 1977, signed by R. K. Stafford, Senior Vice President; (2) ARCO Pipeline Company, June 1, 1977, signed by J. D. Wessling, Comptroller-Treasurer and Manager-Administration & Control; (3) BP Pipelines, Inc., May 27, 1977, signed by P. H. Jones; (4) Exxon Pipeline Company, June 1, 1977, signed by J. D. Sturtevant, Controller; (5) Mobil Alaska Pipeline Company, May 27, 1977, signed by C. R. Thompson, Controller-Treasurer; (6) Phillips Petroleum Company—estimates, unsigned two pages; (7) Union Alaska Pipeline Company, May 27, 1977, signed by E. J. Takach, Controller; and, finally, (8) Sohio Pipeline Company, June 10, 1977, telephone communication to I.C.C.

2. See letters cited in immediately proceeding footnote.

has ever been provided to substantiate this number.[1] Based on an expansion of the individual depreciation expenses for 1978 claimed by the various TAPS carriers, which expense include amortization of the interest during construction, the claimed interest during construction varies substantially. However, the highest claimed total TAPS cost, including capitalized interest during construction, of $9,590,000,000 (based upon Amerada Hess' expansion of its claimed individual depreciation and amortization cost of $5,754,000 for its 1.5% interest) indicates total interest during construction of $1.618 billion, which appears to be substantially overstated. The average interest during construction, even accepting the realiability of the carrier figures, would indicate a figure of approximately $1.2 billion, rather than the $1.3 billion referred to by Alyeska.

3. *Operating Expenses Other Than Depreciation and Amortization.*

Operating expenses other than depreciation claimed by the TAPS owners do appear to be highly questionable as to the accuracy and reasonable nature of the amount claimed under honest, economical and efficient management particularly in the areas of: (1) Outside services which account for approximately 50 percent of the expenses incurred by Alyeska (Accounts 320, 420 and 520); (2) Expenditures for operating fuel and power (Account 330) by Alyeska as well as the additional amounts reported as being incurred directly by the individual pipelines, particularly in view of the question as to the possible sources of such fuel and power and the prices at which it would be

1. At the "Sunshine Act" Conference of the Commission on May 3, 1977, an apparently incorrect number provided by Touche Ross of $2.3 billion for interest during construction was referred to. This was subsequently conceded to be incorrect.

purchased from such sources; and (3) The general lack of documentation and support by way of explanation for any of the claimed amounts attributed to specific accounts. In sum, the operating expenses other than depreciation are certainly the proper subject for serious question as to the necessary amount under honest, economical and efficient management. However, the total operating expenses, incurred by both Alyeska and the individual pipelines for other than depreciation accounts for approximately *90 cents per barrel* in the total cost of transportation.

4. *Depreciation And Amortization Expenses*

Depreciation and amortization expenses are significantly overstated as a result of the interaction of two factors: (1) the inclusion in the depreciation base of all expenditures including those which are excessive and which should ultimately be disallowed; and (2) the use of a depreciation life substantially shorter than would be permissible under presently outstanding orders of this Commission applicable to individual TAPS carriers or under the known facts. The TAPS carriers are using 25 years whereas a life of 35 years or more would be normal. The shift from 35 to 25 years increases the depreciation expenses by approximately 40 percent or approximately 23 cents per barrel based upon the different depreciation bases apparently used by the separate TAPS carriers. By using a short 25 year life, depreciation and amortization expenses claimed by the TAPS carriers, which "expenses" represent non-cash items, amount for approximately 84-85 cents per barrel at 1.2 MMB/D. These expenses should be reduced by 23 cents per barrel to reflect a more realistic 35 year life.

5. *Interest Expenses.*

Because the rate base is inflated by excessive costs which may be disallowed under the prudent investment standard mandated by the requirement for honest, economical and efficient management, claimed interest expenses in connection with debt incurred to make those TAPS expenditures are likewise and equally overstated. The total of the interest expenses claimed by the TAPS owners for a one-year period is $695,052,000 or 158.69 cents per barrel at an average throughput of 1.2 million barrels per day.

The total of all claimed expenses incurred by the TAPS owners only amounts to approximately $3.44 per barrel. A $3.44 per barrel rate figures on an average daily throughput of 1.2 MMB/D will cover: (1) total "operating expenses" of 175.93 cents per barrel, including the non-cash allowance for depreciation and amortization amounting to 83.28 cents per barrel over the shortened 25 year life of a pipeline with a claimed $9.275 billion cost; (2) removal costs of 9.58 cents per barrel; and (3) interest expenses of 158.69 cents per barrel.

There is still a quantum leap from the pipelines' coverage of all expenses, including depreciation, removal costs and interest totalling only $3.44 per barrel to the tariffs which they have published which exceed $6.00 per barrel. As indicated above, the weighted average rate for the seven pipelines accounting for 98.34% of the total volume is $6.20 per barrel. The difference between $6.20 per barrel and the total of $3.44 per barrel covering all expenses, cannot be and is not justified by the demand for "profit" or a return to the stockholders the oil companies.

Every penny over the reasonable allowance to stockholders for a fair return on those stockholders' actual investment constitutes a discrimination, if not a rebate, to

them as shippers who are being preferred to the prejudice of non-owning shippers in violation of Sections 2 and 3(1) of the Interstate Commerce Act.

Perhaps the most significant effect of a TAPS rate that a rate even one cent higher than absolutely necessary operates to exclude would be competitors of TAPS owners and, most significantly, a higher than necessary TAPS rate, will result in costs which "will not be affordable by some future energy projects with the result that some known energy sources will not be developed."•

In view of the serious doubts as to whether the construction expenditures as well as claimed operating expenditures and other expenses projected for a years' operation are valid under the standard of providing transportation service at the lowest cost consistent with honest, economical and efficient management, the stockholders, who stand in the place of the pipeline management, shall not be entitled to rewards beyond a minimum return on their actual investment. Average and high returns are merited only by management which can demonstrate that it is deserving of additional incentives and rewards as a result of proven efficiency.

In addition, any analysis of the comparable risk involved in the financing and recovery of an investment in a pipeline such as TAPS which is in a totally dominant monopoly position and is the only means of transporting billions of barrels of necessary oil reserves from Alaska, would show that such risks are minimal. The risks of the pipeline, which was only built after there were known reserves and a known market, are not the risks of an oil company exploring for oil. The pipeline is only constructed after the exploration has been completed and there are proven "recoverable reserves". Under these circumstances it would be unconscionable for the Commission to permit the pipe-

lines to earn a return on the equity portion of the investment and thereby reward management and the stockholders (the oil company owners) with more than a minimum return commensurate with the efficiency and economy of the management in being able to meet the requirement for transportation service at the lowest possible cost.

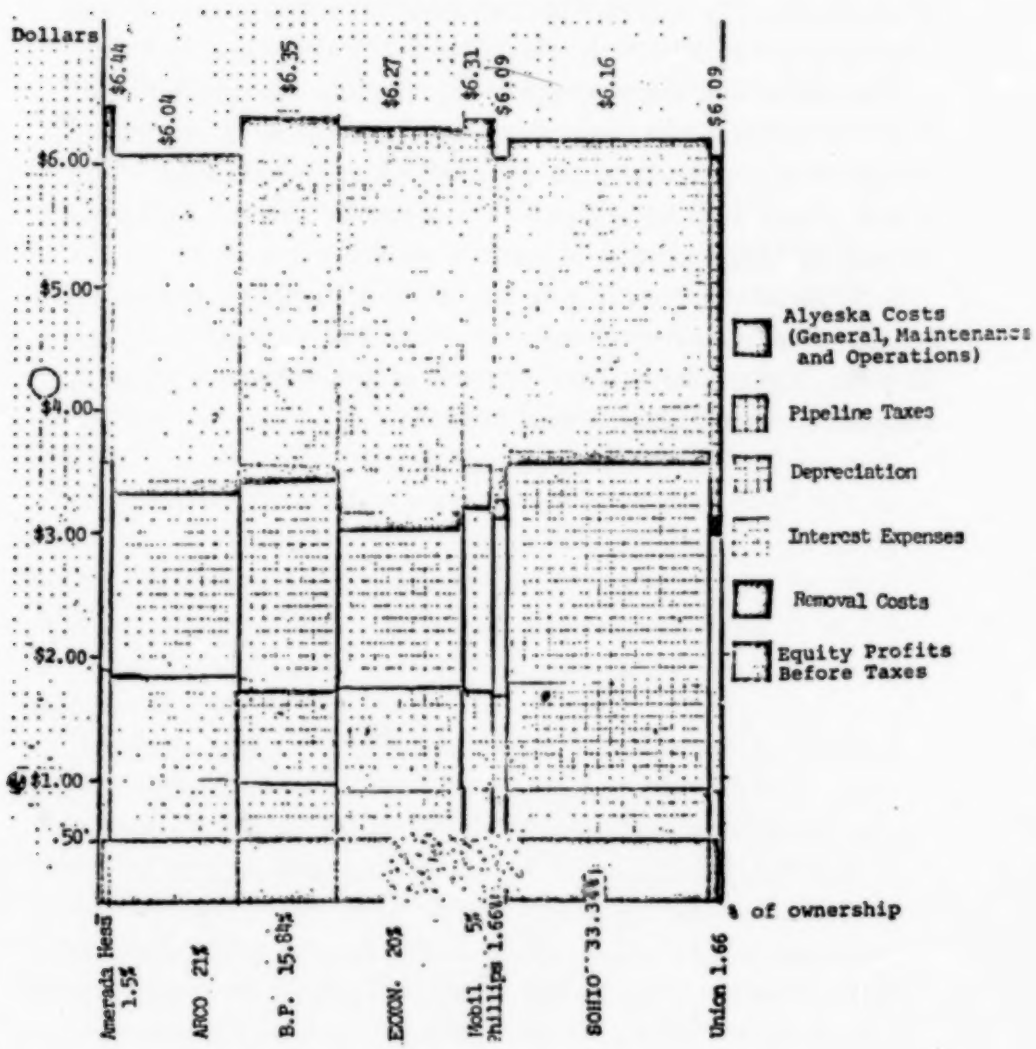
The following page graphically depicts the elements of the TAPS tariffs in cents per barrel based on the carriers' submission summarized in Appendices A & B, hereto. The graph alone indicates there is too much "green" going to the oil company equity owners of TAPS.

A $6.20 average rate per barrel will result in excessive profits. Initial rates should be permitted to become effective no higher than those shown in the table at page 4, subject to investigation and refund.

Protest of the State of Alaska Seeking Suspension.

PROTESTED TAPS RATES

A Breakdown Analysis of
Costs and Profits Per Barrel



Protest of the State of Alaska Seeking Suspension.

ARGUMENT

I. *The Commission's Power to Suspend Initial Rates*

• • •

II. *Development of Vital Energy Sources Requires Suspension of the Protested TAPS Tariffs*

Perhaps the most important aspect of this case is its impact upon the development of future energy sources, as well as other development, in the area tributary to and potentially served by TAPS. The economic potential and viability in the development of energy sources on the North Slope of Alaska is directly related to the level of the TAPS tariff. For development to be economically feasible the return to the producer must include not only the production costs but also the transportation costs to the ultimate market so that the price at that market is competitive. To the extent that the TAPS rate is even one cent higher than absolutely necessary to meet the standards of the National Transportation Policy and the rule of rate making that rates must promote safe, adequate, economical and efficient service and sound economical conditions in transportation, further development of Alaska's vast oil resources will be discouraged and possibly prevented.[1]

It is obvious that the costs reasonably incurred by way of prudent expenditure in the construction and operation of TAPS can and should be borne by the rates paid for the transportation of oil from Alaska's North Slope. But it is only such reasonable and prudent expenditures consistent with honest, economical and efficient management which should be included within the transportation charge be-

1. See 45-50 *infra.* relative to depreciation where the amount of potentially recoverable oil resources in Alaska is discussed.

cause the cost of transportation must ultimately be borne by the consumer in the form of higher energy costs. In addition, excessive transportation costs will deter the development of needed energy resources. These points were recently made with some eloquence by Mr. E. L. Patton, Chairman and Chief Executive Officer, Alyeska Pipeline Service Company, to the Town Hall of California, in Los Angeles, California where he stated on May 17, 1977:

> "Obviously, the costs of these things [pipeline construction costs including environmental related expenditures] must ultimately be borne by the consumer in the form of higher energy costs. What is not so obvious is that the requirements will not be affordable by some future energy projects *with the result that some known energy sources will not be developed,* and all projects will have longer lead times and longer construction schedules." (Emphasis added.)

Mr. Patton's statement regarding the impact of costs related to environmental and other factors is equally applicable to the impact of transportation rates above the level absolutely necessary to provide service at the lowest cost under honest, economical, and efficient management.

The eight oil pipelines which are the owners of TAPS are owned by vertically integrated companies and they will use their individual TAPS interest to ship their own crude oil plus whatever other oil will be tendered by non-owning shippers or by owner-shippers producing in excess of their pipeline capacity. Clearly, excessive transportation rates will deter development of energy resources by producers other than the TAPS owners. However, even if almost all shipments are made by owners of the pipelines, aggressive and effective rate regulation is still absolutely necessary since excessively high rates would discourage maximum efficient use of the line even by owner-shippers and thus would inhibit development of the oil resources in Alaska.

As recently stated by the Justice Department in its submission to this Commission in Ex Parte 308, *Valuation of Common Carrier Pipelines,* under date of May 27, 1977:

> ". . . First, as excess earnings are the result of a rate structure which yields returns beyond what is reasonably necessary to attract capital, we must assume that the actual tariffs charged do not encourage the maximum efficient use of pipelines. Consequently, the amount of oil reaching final markets is artificially restricted and its price is necessarily too high. . . ." (Page 27)
>
> ". . . Important goals of regulation are to encourage greater output than the firm would produce if unregulated and to ensure that the costs savings derived from economics of scale accrue ultimately to the consuming public in the form of lower prices. The tariff rate level of a regulated pipeline which will just cover all costs including the cost of capital should be lower than the level an unregulated firm would set in order to maximize its profits. Since the demand for pipeline services will be greater at a lower tariff rate, proper regulation will result in a greater output than no regulation. . . ." (Pages 49-50)
>
> ". . . Consequently, pipeline rate bases are inflated and tariff rates are significantly above the level necessary to allow owners a reasonable return on investment. The result is to reduce the amount of

> petroleum carried by way of this most efficient mode of transportation to the detriment of national energy objectives." (Page 61)

Unless the Commission suspends the protested tariffs and only permits rates to become effective at the lowest cost consistent with the provision of honest economic and efficient service, any higher rate level will be detrimental of the national energy objective of encouraging the maximum production of domestic oil, including the North Slope of Alaska. The high tariff will make it economically less feasible or perhaps non-feasible for other than the owners of the pipeline to develop petroleum resources on the North Slope. Higher than necessary tariffs will, *de facto*, operate to create an exclusive club of those who can afford to develop the North Slope, that club being comprised of those oil companies who own the TAPS carriers. High TAPS tariffs will deny the nation the benefit of competitive development of our energy resources contrary to the goal of Congress as indicated in the legislative history of the Trans-Alaska Pipeline Authorization Act, P.L. 93-153.[1]

To stimulate the maximum production and development of our natural resources on the North Slope of Alaska, the TAPS tariffs must be held to lowest cost consistent with the provision of service as mandated by Congress.

III. *The Protested Tariffs are in Violation of the Commission's Criteria for Total Pipeline Fair Earnings.*

Apparently the primary reason as to why the TAPS tariffs are so excessively high (in addition to the fact that construction costs and the related interest during construc-

1. See Senate Report No. 93-207, June 12, 1973.

tion expenses are excessive and an unreasonably short service life is assumed for depreciation and amortization purposes) is that the pipelines are simply and boldly asking to be paid twice for a return on the investment. The carriers would like the public and the Commission to believe that they are only asking for a very low "return on investment". For example, in the *Washington Star* on Wednesday, June 1, 1977, under a front page headline stating "That Alaska 'Cheap Oil' Price Tag Goes Up", where the issuance of the first TAPS tariff by Arco at $6.04 per/barrel was reported, there is the following statement:

> "An ARCO official said the transportation cost is calculated to yield the owners of the pipeline—the parent oil companies—a return on their investment of 7 percent. He pointed out that the I.C.C. has approved an 8 percent-return on other crude oil pipelines and 10 percent on pipelines that carry petroleum products."

To properly understand the mentality of the pipelines in publishing the high rates as evidenced in their TAPS publications it is necessary to penetrate the meaning of the words "their investment" and contrast the pipeline's meaning with any normal regulatory sense of the concept of "capital invested" in used and useful property. While it is true that the pipelines as such may be able to claim that they have spent money and therefore "invested" in excess of $9 billion in the construction, including interest during construction, of TAPS, the source of the investment capital dollars have been two-fold: (1) debt and (2) equity. In the case of TAPS, it has generally been estimated that of the total cost of construction approximately 85 percent was debt financed with only the balance being provided through

equity investment. Stated differently, out of every $100 actually invested in the construction cost, $85 was provided by lenders in the form of debt and $15 was provided by equity shareholders (the parent oil companies) in the form of equity investment. Yet the pipelines, as indicated by the above statement attributed to the Arco official,[1] apparently designed their rates to provide a return to the equity owners in a dollar amount equivalent to 7 percent of the *total* investment, not 7 percent on "their [the parent oil company's equity] investment."

Simply stated, a rate structure that provides a return to the equity owners equivalent to 7 percent of the total capital invested when in fact the equity investment is only 15 percent of the total capital results, *de facto,* is a return to *equity* of 46.7 percent (7 divided by 15). It is inconceivable that the pipelines could really believe that the Interstate Commerce Commission would permit such returns as just and reasonable.

Administrative Law Judge Joseph L. Nacy in Docket 36244, *Charge for Terminalling and Storage, Kenai Pipe Line,* clearly rejected a pipeline argument that the consent judgment of the District Court of the United States for the District of Columbia, entered December 23, 1941, in that court's Civil Action No. 14060, *United States of America* v. *Atlantic Refining Company, et al,* allows a pipeline after tax earnings to the equity owner of up to 7 percent of valuation stating:

> "KPL has laid stress on the above-cited District Court case as authority for its being permitted to earn 7 percent above valuation, while APC dismisses the case as being no authority. My reading of the copy of the judgment attached to APC's verified submission leads me to agree with protestant. The judgment attempts only to set a limit upon the amount of *dividends* which may be paid by pipeline companies to their shipper-owners. It goes no farther than this, and is not authority for limiting or expanding the amount of *earnings* any pipeline company may enjoy."[1]

1. Cf. June 14, 1977 letter to I.C.C. from Union Alaska Pipeline Company using "Maximum Allowable 7% Consent Decree Net Income" for equity only.

The carriers are clearly incorrect when they assume that the Commission will grant them rates which will provide the equity holders of the pipeline a "return on investment" (profit to the equity holder, after taxes) computed by applying a rate (either the 7 percent mentioned in the Consent Decree, the 8 percent used by the Commission for its criteria for pipelines, or some other alleged cost of capital or rate of return) against a base reflecting either the total capital invested in the carrier property or even a "valuation" which exceeds the amount of total capital actually invested in the carrier property. Yet it is obvious that the TAPS carriers are operating upon the basis of such a mistaken belief or gross misunderstanding of the Commission's interpretation of "just and reasonable" when they seek to extract rates in excess of $6.00 per barrel to transport oil from Prudhoe Bay to Valdez.

The obvious misinterpretation or misunderstanding of the proper regulatory criteria is apparent upon review of the submission dated June 13, 1977 from Sohio Pipe Line

1. By order of the Commission, Division 2 (Commissioners Hardin, O'Neal and Christian), dated October 19, 1976, served October 21, 1976 the Commission allowed the withdrawal of the protest of the Alaska Pipeline Commission and discontinued the proceedings in light of the statement of position of the Alaska Pipeline Commission which had been submitted in lieu of exceptions.

Company to the Interstate Commerce Commission over the signature of J. T. Boltacz, Vice President, Sohio Pipe Line Company. This letter was received by the undersigned counsel for the state of Alaska at 2:45 p.m. on Tuesday, June 14, 1977, the day before this protest was due to be filed pursuant to the request of the Interstate Commerce Commission. A review of that submission, particularly Schedule I thereto, reveals that Sohio calculates its "accumulative rate of return %" as a percentage of the "valuation" but after deducting ad valorem taxes, operating expenses other than depreciation and ad valorem taxes, depreciation, *interest expense*, and "statutory income taxes".

The pipelines are blatantly asking that they be paid twice for the return on that portion of the investment in the carrier property which was provided by debt capital: first in the form of interest expenses and second in the form of a "return on investment" calculated against the total cost of the carrier property, which includes debt as well as equity securities. The most polite term that could be applied to this process is "double-dipping", with all of its connotations. In the vernacular it might be referred to as a colossal "rip off." If, in fact, the pipelines believe what they say when they claim that they are only following "the methods traditionally utilized in testing the effect and fairness of common carrier pipeline rates"[1] then there is great reason for concern that the excessive profits which also permeate the TAPS tariffs may also permeate other oil pipeline rates.

Whether or not the deduction of interest before calculating a return on the total capital can accurately be charac-

1. Sohio Pipe Line Company letter of June 13, 1977 to the I.C.C., p. 2; Cf. Union Alaska Pipeline Company, June 14, 1977 letter.

terized as "the methods traditionally utilized" in calculating pipeline rates,[1] the traditional methodology which was allegedly utilized by the pipeline companies in establishing their tariffs has resulted in excess profits to the pipeline companies. In this context, it is appropriate to note the *conclusions* reached by the immediate past Attorney General of the United States, Edward H. Levi, when reporting to Secretary of Transportation, William T. Coleman, pursuant to Section 7 of the Deep Water Port Act of 1974 (33 U.S.C. §1506), on the possible anticompetitive impact of licensing Loop, Inc. and Seadock, Inc. as ports off the coast of Texas. That report, dated November 5, 1976 states:

> "While I.C.C. regulation prevents firms from exploiting this natural monopoly to the fullest extent, it probably allows some excess profits to be earned." (page 56)
>
> • • •
>
> "Our analysis indicates that I.C.C. regulations is far from perfect and will result in a tariff which yields profits in excess of the required return to capital." (page 61)

Even though the "methods traditionally utilized" have resulted in excess profits to the oil pipeline companies, as noted above, an analysis of the Sohio tariff indicates that the Sohio rate calculations are based upon an incorrect interpretation of the "methods traditionally utilized" by the Commission. The Sohio rate calculations result in a return even greater than permitted by Commission precedent. It is therefore necessary to discuss the "methods traditionally utilized" by the Commission and the manner in which the Sohio rate calculations deviate from precedent.

1. This issue is further discussed *infra*, at pp. 35-36.

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Pipelines are extremely important in the transportation system of this country. In 1975, 104 pipelines subject to ICC regulation accounted for the transportation of 488 trillion ton-miles or 23.51% of the total of all modes in that year.[1] Pipeline transport crude oil, petroleum products such as gasoline, kerosene, jet fuel, fuel oils, LPG, as well as, more recently, liquid fertilizers (principally anhydrous ammonia) and coal via coal slurry pipelines. Despite this great importance of transportation via pipeline and the fact that the ICC has had jurisdiction over pipelines since 1906 with the passage of the Hepburn Act, there are relatively few cases dealing with pipeline rate regulation.

The Commission has considered the reasonableness of pipeline rates in basically four case: *Reduced Pipe Line Rates and Gathering Charges,* 342 I.C.C. 115 (1940), *Petroleum Rail Shippers' Assn.* v. *Alton & S.R.,* 243 I.C.C. 589 (1941); *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.,* 258 I.C.C. 41 (1944), and *Petroleum Products, Williams Brothers Pipe Line Company,* 351 I.C.C. 102 (1975) affirmed on reconsideration, —— I.C.C. —— (Docket 35533 et al., served December 21, 1976).[2] This last decision in Docket 35533, et al., is the subject of a petition for judicial review.[3] There is a related case involving a subsequent increase by the same pipelines, Williams Pipe Line Company

1. 90th Annual Report of the ICC, Appendix E, Table 3, page 142.

2. On March 4, 1977 in I&S No. 9128, *Anhydrous Ammonia, Gulf Central Pipeline Company,* (Unprinted, Review Board No. 4) a Review Board found a proposed 10 percent general increase shown to be just and reasonable based on the 10 percent return in valuation criteria.

3. *Farmers Union Central Exchange et al* v. *I.C.C. and U.S.,* No. 76-2138, United States Court of Appeals for the District of Columbia, filed December 21, 1976

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and Explorer Pipeline Company, which is presently pending before the Commission.[1]

In each of those decisions the Commission's valuation of the carriers' properties, rather than the original cost less accrued depreciation or net investment, was used as the rate base in judging the reasonableness of the carrier's rates. Rates of return of 8 percent on valuation for crude oil pipelines and 10 percent on valuation for petroleum products pipelines were determined to be reasonable in the *Reduced Pipe Lines Rates, Minnelusa,* and *Petroleum Rail Shippers,* cases, *supra* and still followed in the recent *Williams* cases, *supra.* In *Williams,* the Commission stated that "until the principles underlying the determination of a fair rate of return for pipelines can be formulated in a proper proceeding, it would be unwarranted for us to hold that a rate of return which was considered reasonable in 1941 is excessive today." (Docket 35533, December 3, 1976, p. 11). The Commission has further indicated that the appropriate proceeding for consideration of possible modification of its valuation rate base methodology as well as the proper rate of return for pipelines is Ex Parte 308, *Valuation of Common Carrier Pipelines,* a proceeding started in 1974 and in which the *opening* statements were submitted April 27, 1977 and reply statements were submitted May 27, 1977 with a hearing now scheduled for August 16, 1977. *See* 351 I.C.C. 102, 106, 112, 126 (1975).

The Sohio rate calculations determine the rate of return *after* deduction of interest. However, in each of the Commission proceedings where it has dealt with the question of a fair return to pipelines, the determination that an annual return of more than 8 percent on value would be in excess

1. I&S 9089, *General Increase, December 1975, Williams Pipeline Company,* pending on exceptions to the Initial Decision of Administrative Law Judge, Earl S. Dowell, served July 27, 1976.

of a fair return was calculated *before* deduction of any interest expense.

The presently controlling precedents, *Reduced Pipeline Rates and Gathering Charges,* 243 I.C.C. 115 (1940); *Minnelusa Oil Corp.* v. *Continental Pipeline Co.,* 258 I.C.C. 41 (1944); and *Petroleum Products, Williams Brothers Pipeline Company,* —I.C.C.— (December 21, 1976, not printed), affirming 351 I.C.C. 102 (October 1975), clearly indicate that it is not the I.C.C. methodology to deduct interest expenses before calculating an overall allowed rate of return.

In I.C.C. Docket No. 36244, *Charge for Terminalling and Storage, Kenai Pipe Line,* Administrative Law Judge Joseph R. Nacy in an initial decision served July 20, 1976 concluded:

> ". . . . That interest should not be included as an expense item for the purpose of the present proceeding. However, the rate of return is expected to cover serving of debt."

In other words, under Commission precedent the 8 percent on valuation is to encompass and include the coverage of interest payments within the balance remaining for equity.

As noted above, as recently, as December 3, 1976 the Commission [Vice Chairman Clapp and Commissioner Christian not participating, Commissioner (now chairman O'Neal), dissenting] stated that "considerations of consistency and fairness require that we adhere to our previously recognized criteria in investigating the rates of particular pipelines at the present time." Docket No. 35533, *Petroleum Products, Williams Brothers Pipe Line Company,* —I.C.C.— (Decided December 3, 1976, served December 21,

1976, not printed, page 8), affirming 351 I.C.C. 102 (1975). At page 16 of the December 3, 1976 Report of the Commission on Reconsideration in the *Williams* case the Commission again explicitly set forth its method of computing a "return on valuation" for the purpose of testing the return against its criteria. The criteria in the *Williams* case, since Williams was considered a product line, resulted in return on valuation of 10 percent.

The following table sets forth a comparable computation, based upon the Commission's methodology, of the "return on valuation" for Sohio Pipe Line Company utilizing the information made available by Sohio in the afternoon of Tuesday, June 14, 1976.

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TABLE

Calculations Of TAPS Profits And Expenses Based On Sohio Pipe Line Company Estimates

		Amount	Cents Per Barrel
1.	Tariff	$6.16	616.00
2.	Shipments Million Barrels Per Year	- 146 -	
		(Millions of Dollars)	
3.	Valuation	$3315.0	
4.	Operating Revenue	899.4	616.00¢
5.	Operating Expenses:		
	a. Ad Valorem Taxes	51.0	34.93¢
	b. Operating Expenses	98.2	67.27¢
	c. Depreciation	126.2	86.44¢
	d. Total "Operating Expenses"	275.4	188.36¢
6.	Net Carrier Operating Income	624.0	427.40
7.	Interest	252.5	172.94
8.	Ordinary Income Before Taxes	371.5	254.45
9.	Statutory Income Taxes:	196.5	134.38
	a. Alaska (9.4%)	34.9	23.90
	b. Federal (48%)	161.6	110.68
10.	Net Income	175.0	119.86
11.	Equity	444.0	—
12.	Rate of Return On Equity After Taxes	39.4%	
13.	Rate of Return On Valuation Before Taxes (Line 6÷ Line 3)	18.8%	
14.	Rate of Return on Valuation After Taxes (Line 6-Line 9 ÷ Line 3)	12.9%	

Source: Sohio Pipe Line Company letter to I.C.C. dated June 13, 1977 and accompanying Schedules.

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The foregoing Table of Calculations of TAPS profits and expenses based on Sohio Pipe Line Company estimates made available on June 14, 1977 proves that the rate of $6.16 as published by Sohio is clearly unjust and unreasonable. Assuming, *arguendo,* the propriety of imputing statutory income taxes, even though it is known that Sohio will be able to defer the payment of federal income taxes as a result of accelerated depreciation and will receive investment tax credits of substantial amounts resulting from their investment, the rate of return after imputed taxes on shareholder equity will be 39.4 percent! (Shareholder equity is admitted by Sohio to be only $444.0 million, Sohio's Schedule V). We submit that any "regulated" rate which contemplates that type of return, even assuming the validity and allowable nature of all of the carrier expense claims, is clearly unjust and unreasonable and, therefore, the protested proposed rate of $6.16 filed by Sohio must be suspended.

Sohio contemplates a rate of return on total valuation before taxes of 18.8 percent. Again there is the question as to whether or not it is appropriate to impute taxes that will not actually be paid. Even assuming such taxes are imputed, the rate of return on valuation after imputed taxes is 12.9 percent. This is 4.9 percent above the Commission's past criteria of 8 percent return on valuation. Of course, if the 8 percent return on valuation is to be utilized, the imputed taxes will be reduced by comparable amounts based upon a return of 8% rather than 12.9%.

Based upon an assumption that all of Sohio's claimed expenses are to be allowed and that the "valuation" as they calculate it could be used as the basis for determining rates, the following Table calculates the maximum reasonable revenues based upon the Commission's standard of an 8 percent return on value for crude lines:

TABLE

Calculation Of TAPS Tariff Assuming 8 Percent Return On Valution And Allowance Of All Claimed Sohio Expenses

		Amount	Cents Per Barrel
		(Millions of Dollars)	
1.	Operating Expenses:		
	a. Ad Valorem Taxes	$51.0	34.93¢
	b. Operating Expenses	98.2	67.27¢
	c. Depreciation	126.2	86.44¢
	d. Total "Operating Expenses"	275.4	188.36¢
2.	Return of 8 Percent On Valuation ($3315.0 million X .08)	265.2	181.64
3.	Interest Expense	252.5	172.94
4.	Ordinary Income Before Taxes	12.7	8.70
5.	Statutory Income Taxes	6.7	4.59
	a. Alaska (9.4%)	1.2	0.82
	b. Federal (48%)	5.5	3.77
6.	Net Income	6.0	4.11
7.	Total Revenue	$547.3	374.86

Applying the Commission's criteria of an 8 percent return on valuation and allowing *arguendo* all of the operating expenses claimed by Sohio (even though, for example, depreciation is clearly overstated by approximately 24¢ per barrel through the use of a 25 year pipeline life rather than 35 years), the total fair revenue needs of Sohio are $547.3 million, which based upon a Sohio volume of 146 million barrels per year[1] establishes the total fair revenue rate to be $3.75. The addition of 9-10¢ per barrel

1. 1.2 million barrels per day total pipeline throughout X 365 days per year X 33.34 percent interest of Sohio.

for the accumulation of removal costs, which appears to be too high since it ignores the earning capacity of that removal fund and is based upon a 25 year rather than 35 year pipeline life, would bring the rate only to $3.85.

The State of Alaska opposes the use of the Commission's "valuation" as a rate base. The inherent defect and problem in the "valuation" rate base is that it is inflationary and precludes meaningful comparable earnings analysis. Since Alaska is against the use of the valuation base we do not urge that the Commission use its standard criteria of an 8 percent return on valuation as the maximum measure of the TAPS tariffs. Alaska does point out that if the Commission applied that standard as it said was required by "consistent and fair treatment", a Sohio rate no greater than $3.85 could be permitted to become effective. At minimum, the carriers have been on notice of at least 35 years that the Commission's method of determining maximum fair rates was, in fact, to allow only an 8 percent return on valuation. Carrier contentions that they have a right under I.C.C. consistent regulation to a greater amount is manifestly absurd. The fact that some carriers may have published rates based upon such absurdly erroneous assumptions and, for one reason or another, were able to have those rates go into effect *without challenge* does not mean that they are entitled to develop TAPS tariffs.

An analysis of the Union Alaska Pipeline Company submission to the Commission under date of June 14, 1977, accompanying the filing of its tariff at $6.09 per/barrel, establishes that the rate is designed to provide the equity owner with an *after* tax return of 64.3 percent on annualized basis in the first year of operation. A rate that proposes such a profit is clearly unjust and unreasonable and must be suspended. Union claims a total rate base (includ-

ing construction costs, capitalized costs, capitalized interest on financing through August 31, 1977, and capitalized supplies) totalling, as its 1.66 percent share, $144,187,000. Union also reveals that its financing includes $83,125,000 of medium and long term notes at 8.3 percent and $45,314,000 of short-term paper at 5.4 percent, for total debt financing of $128,439,000. Therefore, the maximum of Union's total *equity* TAPS cost would be $15,748,000, or 10.9 percent of the total. Since Union has calculated its tariff rate so as to return a profit *after* taxes of $3,374,000 for only one-third of a year's operation, on an annualized basis the net income available to equity after taxes would be $10,122,000, or 64.3 percent of the equity investment in Union Alaska Pipeline Company. Figures on page 2 of the Union's submission indicate that the $6.09 rate would provide a return on *valuation,* after Union's calculated deduction for imputed income taxes, of 14.0 percent, which is substantially in excess of the Commission's standard of 8 percent on crude lines.

The foregoing discussion using Sohio and Union as examples would appear to be generally applicable to all carriers. Sohio and Union have been used because they did submit, at the last hour, information to permit the foregoing analysis based upon the *carrier supplied* data. Previously submitted information from Union and the other carriers did permit the determination of the total operating expenses, including depreciation, plus interest and removal costs. The dollar amounts for these items have been compiled by specific accounts in the uniform system of accounts and are attached hereto as Appendix A. Appendix B converts those expenditures by specific accounts to a cost per/barrel. The following table gives the total operating expenses per/barrel (including depreciation and amortization, i.e., the total of accounts 300-580) as well as the total

of expenses including interest and provision for removal and restoration as reported by each of the individual carriers.

TAPS Carrier Expenses In Cents Per/Barrel

Carrier	Operating Expenses	Total Expenses
Amerada Hess	182.47¢	365.98
Arco	177.85¢	346.74
BP Pipelines	168.16¢	358.09
Exxon	175.34¢	326.89
Mobil	172.24¢	360.21
Phillips	169.84¢	320.78
Sohio	178.04¢	363.06
Union	168.45¢	310.33

SOURCE: Appendix B and letters to the I.C.C. from individual TAPS pipelines.

The foregoing figures and the more detailed presentations of the expenses per/barrel by specific categories for the individual carriers are set forth in the color graph, *supra,* at p. 15c.

Operating expenses (the total of all expenses incurred and chargeable to accounts 300-580) require only between $1.65 and $1.82 per/barrel, assuming, *arguendo* the validity and accuracy of all of the carrier projections. Of those operating expenses approximately 83-86 cents per/barrel will be in the form of depreciation and amortization charges for an unreasonably short 25 years.[1] Since depreciation and amortization reflects a non-cash expenditure and actually constitutes a recovery *of* capital invested, the cash

1. See discussion with respect to the appropriate depreciation life *infra,* pp. 45-50.

requirements to cover operating expenses are only approximately 90 cents per/barrel.

Interest expenses per/barrel vary as between the carriers from $1.32 to $1.75 per/barrel.

IV. *Depreciation and Amortization Accruals by TAPS Owners are Excessive.*

Each of the TAPS carriers have assumed a service life of only 25 years. The Commission's normal practice is to generally allow oil pipeline service lives of 35 years for crude oil trunk lines. The 25-year depreciation life submitted by TAPS owners is far less than the depreciation lives of other pipeline properties owned by these same pipeline companies. For example, in their annual report Form P submitted to the I.C.C. for the year 1976, four of the presently regulated pipelines used the following averaged depreciation rates for trunk line properties:

Depreciation Rates and Related Life for TAPS Carriers

Pipeline	Average Depreciation Rate	Related Life
Arco Pipe Line Co.	2.34%	42.74 yrs.
Exxon Pipeline Co.	3.36%	29.76 yrs.
Mobil Pipeline Co.	2.88%	34.72 yrs.
Sohio Pipe Line Co.	2.73%	36.63 yrs.

The Commission's regulations in its Uniform System of Accounts for Pipelines, 49 C.F.R. § 1204, defines depreciation as:

> "the loss in service value not restored by current maintenance and incurred in connection with the consumption or prospective retirement of property

> in the course of service from causes against which the carrier is not protected by insurance, and *the effect of which can be forecast with a reasonable approach to accuracy.* (emphasis added)

The starting point for figuring Alaskan crude reserves is the Prudhoe Bay Field. In a January 4, 1977 letter to all TAPS owners this Commission asked, *inter alia,* for the companies to supply information on the "total number of barrels of known recoverable oil reserves in the Prudhoe Bay Field and any other fields that can reasonably be expected to produce oil that will be transported through TAPS." The oil pipeline responses to the ICC query indicate that for purposes of figuring depreciation rates, they are using the figure of 9.5-9.7 billion barrels of known recoverable reserves, making TAPS economically viable for a 25 year period. However, the figure of 9.5-9.7 billion barrels does not include "any other fields that can reasonably be expected to produce oil that will be transported through TAPS" nor does it even include all of the Prudhoe Bay Field. Within the Prudhoe Bay Field are two other pools in addition to the main Prudhoe Oil Pool—the Lisburne and Kuparuk Oil Pools. These latter two pools are estimated to contain on the order of 1.3 to 2.1 billion barrels of crude.[1] The oil in these two other pools is acknowledged to exist by the oil companies but the reason given for not including it in known recoverable reserves is that "it has not been determined to be capable of commercial production."[2] We submit that there is almost complete cer-

1. "President's April 15, 1977, Report to Congress on the Pricing of Alaska North Slope (ANS) Crude Oil" at p. 77.

2. Letter to I.C.C. from Arco Pipe Line Company, March 2, 1977, signed by H. H. Baden for J. D. Wessling, Comptroller-Treasurer and Manager-Administrative and Control.

tainty that at some point during the life of TAPS these additional pools will be commercially produced unless the high TAPS tariffs render them economically unrecoverable and this Commission should, accordingly, include these amounts of reserves for purposes of figuring the service life of TAPS. The Lisburne and Kuparuk Oil Pools taken alone will add an additional 3-5 years to the service life of TAPS based on a flow of 1.2 MMBD.

There is reasonable certainty that undiscovered recoverable reserves exist outside the Prudhoe Bay Field. Areas that may contain potentially recoverable reserves include Naval Petroleum Reserve Four and the Beaufort and Chukchi Sea areas. It is possible to cite many statistics but perhaps the most overwhelming one comes from the U.S. Geological Survey which estimates that there is a 95% probability that there is *at least* 9 billion more barrels of undiscovered but recoverable crude oil reserves within onshore Alaska and in offshore waters![1] TAPS is the only foreseeable way that this oil will move from the North Slope.

The oil companies themselves acknowledge the tremendous potential reserves on the North Slope. Less than one month ago an Atlantic Richfield Vice President, testifying at an FEA hearing in Anchorage, Alaska on Alaska North Slope crude oil pricing and entitlement treatment made the following statements:

> "Overall, the U.S. Geological Survey estimates the undiscovered recoverable resources for North Alaska to be about 20 billion barrels of oil and 57 trillion

1. Table, 4. p. 28-29, Geological Estimates of Undiscovered Recoverable Oil and Gas Resources in the United States, Geological Survey Circular 725. Undiscovered recoverable reserves are those reserves yet undiscovered but estimated to exist in favorable geologic settings on the basis of broad geological knowledge and theory *and* which are estimated to be economically recoverable. See *Id.* at 8-9.

> cubic feet of natural gas. The study conducted for the FEA by Mortada International estimated the speculative reserves in the Kuparuk and Lisburne formations at 1.3 to 2.1 billion barrels. Although one can argue with one or more of the specific assumptions made in these studies, *Atlantic Richfield also feels that there is a high potential for additional reserves in North Alaska . . .*"[1]

Later, referring to the Kuparuk and Lisburne formation, the same Arco official stated that under FEA's proposed pricing and entitlements treatment

> ". . . we would expect our North Slope exploration program within the next 12 months to include several exploratory wells to evaluate and delineate the Kuparuk and Lisburne formation. If this program were to be successful, it would lead to a substantial development program with production starting in the early 1980's.[2]

In its January 4, 1977 letter to the pipeline companies, this Commission also asked the companies to "estimate the ownership life of the line." It was made clear that this inquiry was directed at economic ownership, not physical life.[3] The responses of at least two of the companies are inconsistent with the claimed 25 year depreciation life. Atlantic Richfield estimated the ownership life to be

1. Testimony of Howard A. Slack, Area Vice-President, at Federal Energy Administration Hearing in Anchorage, Alaska, May 27, 1977 at pp. 2-3.

2. Id. at p. 3.

3. March 23, 1977 Memorandum by E. Hostettler, I.C.C. Bureau of Accounts, in response to inquiry by Mobil Alaska Pipeline Company; see also letter to I.C.C. from Sohio Pipeline Company, April 29, 1977 in response to I.C.C. request of January 4, 1977.

30 years, adding that the 30 years is also "the initial term of the TAPS Agreement."[1] Phillips Petroleum replied: "The estimated life of the line would be based on the liquid productive life of the Prudhoe Bay Field, which is approximately 30 years."[2] One has to question why a TAPS agreement would be made for 30 years if the pipeline will only be operating 25 years.

As previously mentioned, the Uniform System of Accounts definition of depreciation refers to a loss of service life "the effect of which can be forecast with a reasonable approach to accuracy." In its January 4, 1977 letter to the pipeline companies, this Commission was attempting to gather information to make such a forecast when it asked the pipeline companies to supply information on the reserves in the Prudhoe Bay Field and other fields that are reasonably expected to produce oil that will flow through TAPS. And while the pipelines, despite their inconsistent statements, failed to respond to the inquiry, this Commission can, of course, rely upon other independent sources of information. We submit that, when analyzing functional depreciation related to the exhaustion of supply, it not only is reasonably accurate to include recoverable reserves that have a 95% probability of existing, but that it is inaccurate *not* to include such reserves, especially since these reserves must be transported through TAPS.

Strong support for rejecting the 25-year service life estimate submitted by TAPS-owners comes from a recent case where similar issues were before the court. *Memphis Light, Gas & Water Div.* v. *FPC,* 504 F. 2d 225 (1974). In that

1. Letter to I.C.C. from Arco Pipeline Company, March 2, 1977, signed by J. D. Wessling, Comptroller-Treasurer and Manager-Administration and Control.

2. Letter to I.C.C. from Phillips Petroleum Company, February 25, 1977, signed by W. S. Griffin, Jr., Manager-Valuation Section.

case the FPC had granted a natural gas pipeline company's request for an increase in its depreciation rate due to a claimed future exhaustion in supply. The D.C. Circuit Court reversed, holding that while exhaustion of natural resources can be taken into account for purposes of determining depreciation rates, the FPC, when it substitutes a higher reserve-life-based depreciation rate in place of a previously used and lower physical-life-based rate, must affirmatively find an exhaustion of natural resources. The Court concluded:

> "However, it is for the Commission, not the utility, to determine a depreciation charge that is proper and adequate. The Commission cannot indulge the utility in an abstract projection which is premised on termination of service and which amounts to a "worst case" analysis." (504 F.2d at 234)

By calculating depreciation rates based solely on reserves from the main Prudhoe Bay Field, while ignoring the two other oil pools within the Prudhoe Bay Field and all the other vast recoverable reserves on the North Slope, the pipeline companies are engaging in a worst case analysis.

This Commission, then, should reject a TAPS 25 year service life on the grounds that it is based solely on functional depreciation relating to exhaustion of supply and, as shown above, there is almost complete certainty that additional reserves will become available for transportation through TAPS. Only a worst case analysis would permit the 25 year figure to stand; common sense and case law argue against using such an analysis. The magnitude of the expected recoverable reserves and the fact that all recovered reserves must be transported through TAPS precludes the use of exhaustion of supply as a measuring

life for TAPS. In place of the 25 year service life, this Commission should substitute the normal 35 life for pipelines unless the TAPS-owners can affirmatively demonstrate that the *physical* life of TAPS should be less.

V. *Maximum Initial TAPS Tariff Determination*

It is obvious from the extensive submission by Mr. Lenzner that there are very serious questions as to the manner in which the TAPS line was constructed and as to the allowable nature of hundreds of millions of dollars in the initial cost of construction in light of the requirement that service be provided "at the lowest cost consistent with the provision of such service" under "honest, economical and efficient manner." The related interest during construction further inflates the cost to be borne by the ratepayers and the public. The entire project was apparently approached with a cost plus attitude. Such an approach would only be possible where the resulting line would be in monopoly position and face no meaningful risk of competition or any possible likelihood that the investment would not be able to be recovered. At the time money was expended on the pipeline, oil had already been discovered. It was known that the oil would be produced and would move at almost any rate which might conceivably be charged, even rates exceeding $6.00 per barrel.

None of the "hazards and risks" referred to by the Commission in its earlier pipeline cases are present here except the absurd "risk" allegedly resulting from the fact that a pipeline is "depended upon the volume of movement of one commodity in one direction."[1] We submit that under the circumstances of this case the volumes of movement are and have been accurately predictable. There is no question of the ability of the shippers to develop or purchase oil in

1. *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I.C.C. 41, 51 (1944).

the fields. There is absolutely no risk of alleged "changes in market demand". Nor is there any risk in the "diminishment of the supply of oil in the fields served" in view of the magnitude of the field involved and the potential for the development of other "recoverable reserves" as long as the tariff is not so high as to discourage further development and economic recovery of oil resources. There is no likelihood and therefore no risk that there will be a "shifting of sources of supply through the discovery of new oil reserves or increased production nearer the refinery points" so that the Alaskan North Slope Oil moved through TAPS would no longer be marketable. Because of the cost plus mentality with which the project was approached, it is the position of the State of Alaska that there is minimum risk involved for the equity owners and therefore they are entitled to minimum returns, particularly where there is substantial evidence that the operation as constructed does not reflect the lowest cost consistent with the provision of service under honest, economic and efficient management. Alaska submits that the proper way to determine the reasonable tariff is to allow a return on no more than the reasonable amount of a prudent investment in the used and useful property less all accumulated depreciation. It is also imperative that the Commission, in ultimately determining just and reasonable rates, must make a detailed analysis of the cost of capital including the effect flowing from any imputation of taxes not actually paid. Tax deferral is also a "tax savings" of sort since the taxpayer has the use of the money which would be used to pay the tax for the period during which the tax is deferred.[1] Present consumers should be given credit for the use value of or interest on the deferred tax payment.[2]

1. *People of the State of California* v. *FPC*, 506 F. 2d. 228, (D.C. Cir. 1974).
2. *Ibid.*

Even without being able to evaluate each of these items in detail, because of the lack of information provided by the pipelines, Alaska submits that the overwhelming evidence shows the grossly unreasonable nature of the protested tariffs. Accompanying this protest is a "preliminary analysis of the tariffs filed with the ICC by the owners of TAPS", prepared by Dr. Michael J. Ileo, President, Technical Associates, Inc. Given the data currently available to him, particularly as to the financial structure and the cost of capital, and building upon some of the projected expenses for the operation of TAPS, Dr. Ileo has made preliminary determinations of the level of TAPS tariffs which will yield a fair return on each owner's equity investment in TAPS. Dr. Ileo's statement is incorporated by reference herein.

Based on data submitted to date and estimates derived therefrom, our preliminary analysis reveals that the TAPS tariffs currently filed with the ICC will yield excessive profits to the owning companies. Specifically, we find that:

Owning Company	Filed Tariff	Estimated Profit Rate on Equity
SOHIO	$6.16	264.0%
BP	$6.35	37.6%
ARCO	$6.04	66.0%
EXXON	$6.27	62.2%
MOBIL	$6.31	(Note[1])

1. Estimated return is infinitely high since the 1976 annual report of Mobil Alaska Pipeline indicates a negative equity position.

Dr. Ileo has separately determined the level of tariffs which would yield rates of return on the equity of the five

major companies involved in TAPS at a return of 11, 13 and 15 percent on equity. Those tariffs would be as follows:

Owning Company	Profit Rate On Equity	Tariff
SOHIO	11%	$4.04
SOHIO	13%	4.06
SOHIO	15%	4.08
BP	11%	$4.42
BP	13%	4.56
BP	15%	4.71
ARCO	11%	$3.74
ARCO	13%	3.82
ARCO	15%	3.91
EXXON	11%	$3.80
EXXON	13%	3.90
EXXON	15%	3.99
MOBIL	11%[1]	$3.59
MOBIL	13%	3.59
MOBIL	15%	3.59

1. No equity investment.

It is submitted, as discussed above, that pending the completion of the entire investigation, no tariff should be permitted to go into effect which would allow more than a minimum return to the equity owners. We submit that a return of more than 11 percent would, under the circumstances as presently known, be unjust and unreasonable.

Because the pipeline industry in Ex Parte 308 has made a generalized argument that pipelines are entitled to a 13-14 percent rate of return, Dr. Ileo has calculated the tariffs that would be required to provide such an overall rate of return and what such overall rates of return imply as the

equity rates of return. We emphasize that the 13 to 14 percent is an overall rate of return in connection with which the cost of debt (with debt supporting 85% of the investment) being 8.7 percent. Tariffs based on an overall rate of return of 13 and 14 percent would imply an average rate of return on equity, after taxes, of 37.4 percent and 44 percent, respectively. We submit that rates determined on such a basis, which rates would appear to be $5.86 and $6.30 cents per barrel, respectively, are unjust and unreasonable and should not be permitted to become effective.

CONCLUSION

The state of Alaska submits that the foregoing information and all of the data made available by the carriers to date imperatively requires the entry of an order by the Commission suspending the effectiveness of the protested TAPS tariffs. This suspension should be without prejudice to the filing of lower tariffs which would (1) reflect depreciation and amortization over no less than 35 years, (2) inclusion in the base for both depreciation and return calculations of no more than the lowest amount consistent with the provision of service under the standard of economical and efficient management, (3) returns to equity owners of no more than 11 percent in connection with the initial tariffs, with further consideration of the substantial amount

of capital which will be made available through deferred taxes at no cost to the carriers.

Dated at Washington, DC this 15th day of June, 1977.

Respectfully submitted,

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Due Date: June 20, 1977
Dated: June 15, 1977

[Certificate of Service omitted in printing]

Appendix A
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PER-BARREL EXPENSES OF TAPS CARRIERS BY SPECIFIC ACCOUNT
(CENTS PER BARREL)

		Alyeska (100%)	Amerada Hess (1.5%)	Arco PL (21%)	BP Pipelines (15.846%)	Exxon PL (20%)
	OPERATIONS					
300	Salaries and Wages	2.10	2.10	2.10	2.10	2.10
310	Supplies and Expenses	1.35	1.35	1.35	1.35	1.35
320	Outside Services	1.24	1.25	1.25	1.24	1.24
330	Operating Fuel and Power	6.51	9.02	14.77	9.02	11.64
340	Oil Losses and Shortages	-	-	-	-	-
	Total Operations	11.20	13.72	19.47	13.71	16.33
	MAINTENANCE					
400	Salaries and Wages	1.51	1.52	1.51	1.51	1.51
410	Supplies and Expenses	.89	.89	.93	1.05	.89
420	Outside Services	17.67	17.67	17.67	17.67	17.67
430	Maintenance Materials	1.97	1.97	1.97	1.81	1.97
	Total Maintenance	22.04	22.05	22.08	22.04	22.04
	GENERAL					
500	Salaries and Wages	4.08	4.07	4.08	5.09	4.53
510	Supplies and Expenses	1.50	1.53	1.54	2.37	1.55
520	Outside Services	5.54	12.90	5.54	6.62	5.70
530	Rentals	1.67	1.67	1.67	1.78	1.70
540	Depreciation and Amortization	-	85.73	83.93	74.95	84.13
550	Pensions and Benefits	1.40	1.40	1.40	1.63	1.53
560	Insurance	.91	1.64	.91	1.88	.91
570	Casualty and Other Losses	-	-	-	.14	-
580	Pipeline Taxes	.52	37.76	37.23	37.95	36.93
	Total General, (Outside Service Accts. 320,420, 520)	15.62	146.70	136.30	132.41	136.97
	Sub Total: Operating Expenses	24.45 48.86	31.82 182.47	24.46 177.85	25.53 168.16	24.61 175.34
	OTHER					
650	Interest Expense	2.12	173.94	154.54	171.36	132.83
60	Provision for removal and restoration	-	9.57	14.35	9.57	18.72
	Total Other	2.12	183.51	168.89	180.93	151.55
	GRAND TOTAL	50.98	365.98	346.74	358.09	326.89

Appendix A
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PER-BARREL EXPENSES OF TAPS CARRIERS BY SPECIFIC ACCOUNT
(CENTS PER BARREL)

		Mobil Alaska PL (5.%)	Phillips Pet. Co. (1.666%)	SOHIO PL (33.34%)	Union Alaska PL (1.666%)
	OPERATIONS				
300	Salaries and Wages	2.10	2.10	2.10	2.10
310	Supplies and Expenses	3.17	1.35	1.35	1.35
320	Outside Services	1.25	1.24	1.25	1.25
330	Operating Fuel and Power	5.89	6.51	7.19	9.18
340	Oil Losses and Shortages	-	-	-	-
	Total Operations	12.41	11.20	11.89	13.88
	MAINTENANCE				
400	Salaries and Wages	1.51	1.51	1.52	1.52
410	Supplies and Expenses	1.05	.89	.89	.89
420	Outside Services	17.67	17.67	17.68	17.68
430	Maintenance Materials	1.81	1.97	1.98	1.98
	Total Maintenance	22.04	22.04	22.06	22.06
	GENERAL				
500	Salaries and Wages	4.08	4.08	4.12	4.09
510	Supplies and Expenses	1.54	1.54	1.55	1.54
520	Outside Services	7.17	5.89	8.14	6.04
530	Rentals	1.67	1.67	3.34	1.67
540	Depreciation and Amortization	82.55	83.36	86.42	79.08
550	Pensions and Benefits	1.40	1.40	1.41	1.40
560	Insurance	1.82	.91	1.74	.91
570	Casualty and Other Losses	-	-	-	-
580	Pipeline Taxes	37.76	37.75	37.76	37.76
	Total General (Outside Services Accts. 320, 420, 520)	137.79	136.60	144.48	132.51
	Sub Total: Operating Expenses	26.09 172.24	24.80 169.84	178.4	24.97 168.45
	OTHER				
650	Interest Expense	149.19	141.37	175.03	132.29
660	Provision for removal and restoration	38.78	9.57	9.59	9.59
	Total Other	187.97	150.94	184.62	142.88
	GRAND TOTAL	360.21	320.78	363.06	310.33

Protest of the State of Alaska Seeking Suspension.

Appendix B
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EXPENSES OF TAPS CARRIERS BY SPECIFIC ACCOUNT
($000)

		Alyeska (1001)	Amerada Hess (1.59)	Arco PL (210)	BP Pipelines (15.84%)	Exxon PL (200)
OPERATIONS						
300	Salaries and Wages	9205	138	1933	1,458	1841.0
310	Supplies and Expenses	5918	89	1242	937	1103.6
320	Outside Services	5471	82	1148	867	1094.2
330	Operating Fuel and Power	28528	593	13590	6,261	10205.6
340	Oil Losses and Shortages	-	-	-	-	-
	Total Operations	49122	902	17913	9,523	14324.4
MAINTENANCE						
400	Salaries and Wages	6643	100	1395	1,052	1328.6
410	Supplies and Expenses	3917	59	862	732	783.4
420	Outside Services	77418	1,161	16257	12,263	15483.6
430	Maintenance Materials	8661	130	1818	1,261	1732.2
	Total Maintenance	96639	1,450	20332	15,308	19327.8
GENERAL						
500	Salaries and Wages	17897	268	3758	3,535	3974.4
510	Supplies and Expenses	6758	101	1419	1,651	1401.6
520	Outside Services	24303	848	5103	4,594	5000.6
530	Rentals	7333	110	1539	1,239	1496.6
540	Depreciation and Amortization	-	5,754	77200	52,000	73700.0
550	Pensions and Benefits	6158	92	1293	1,135	1341.6
560	Insurance	4000	108	840	1,307	800.0
570	Casualty and Other Losses	-	-	-	100	-
580	Pipeline Taxes	2283	2,481	-	26,331	32,356.6
	Total General (Outside Services Accts. 320, 420, 520)	68,732	5,782	35652	91,892	130,071.4
	Sub Total: Operating Expenses	107,192	2,091	22,508	17,724	21,578.4
		214,493	12,114	165,049	116,723	153,723.6
OTHER						
650	Interest Expense	9304	11,428	13,200	7,178	16,400.0
660	Provision for removal and restoration	-	629	155,353	126,067	132,780.8
	Total Other	9304	12,057	320,402	242,790	286,484.4
GRAND TOTAL		$223,797	24,171			

Protest of the State of Alaska Seeking Suspension.

Appendix B
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EXPENSES OF TAPS CARRIERS BY SPECIFIC ACCOUNT
($000)

		Mobil Alaska PL (5.67)	Phillips Pet. Co. (1.66)	Exxon PL (31.56%)	Union Alaska PL (1.66%)
OPERATIONS					
300	Salaries and Wages	460.3	152.8	2069.0	152.000
310	Supplies and Expenses	695.0	90.2	1973.0	90.240
320	Outside Services	263.6	90.8	1024.0	90.830
330	Operating Fuel and Power	1290.0	671.5	10,500.0	667.570
340	Oil Losses and Shortages	-	-	-	-
	Total Operations	3710.9	815.3	17,566.0	1,000.930
MAINTENANCE					
400	Salaries and Wages	333.2	110.3	2215.0	110.270
410	Supplies and Expenses	331.0	65.1	1366.0	65.020
420	Outside Services	3870.9	1205.1	25,011.0	1205.130
430	Maintenance Materials	397.9	143.4	2881.0	141.720
	Total Maintenance	4933.0	1523.9	31,506.0	1001.110
GENERAL					
500	Salaries and Wages	886.9	297.1	6012.0	297.000
510	Supplies and Expenses	337.9	113.1	2265.0	112.180
520	Outside Services	1571.3	438.7	11,453.0	439.430
530	Rentals	346.6	121.7	4085.0	121.730
540	Depreciation and Amortization	16080.0	6661.2	136,200.0	5750.000
550	Pensions and Benefits	307.9	102.2	2089.0	102.220
560	Insurance	400.0	66.4	2334.0	66.400
570	Casualty and Other Losses	-	-	-	-
580	Pipeline Taxes	8269.5	2745.4	18,144.0	2745.490
	Total General (Outside Services Accts. 320, 420, 520)	30338.8	9532.8	215,381.0	8638.348
	Sub Total: Operating Expenses	5705.7	1004.6	360,570.6	1015.400
		37778.9	11334.4		12240.180
OTHER					
650	Interest Expense	32674.0	10279.4	235,603.0	9618.440
660	Provision for removal and restoration	4313.5	696.5	14,000.0	492.000
	Total Other	36987.5	10975.9	249,603.0	10315.440
GRAND TOTAL		78953.4	23310.2	330,172.0	22563.620

Protest of the State of Alaska Seeking Suspension.

STATEMENT OF DR. MICHAEL J. ILEO

PRELIMINARY ANALYSIS OF THE TARIFFS FILED WITH THE ICC BY THE OWNERS OF TAPS

This report is prepared by Technical Associates, Incorporated under the direction of Dr. Michael J. Ileo. The purpose of the report is to determine, given data which are currently available, tariffs for the pipeline services provided by the major owners of TAPS which will yield a fair return on each owner's equity investment in TAPS. The report must be viewed as preliminary since all of the owners of TAPS had not submitted complete data to the ICC at the time of this writing. For example, a number of expense items for some of the owners were estimated using data which had been submitted by other owners.

Based on data submitted to date and estimates derived therefrom, our preliminary analysis reveals that the TAPS tariffs currently filed with the ICC will yield excessive profits to the owning companies. Specifically, we find that:

Owning Company	Filed Tariff	Estimated Profit Rate on Equity
SOHIO	$6.16	264.0%
BP	$6.35	37.6%
ARCO	$6.04	66.0%
EXXON	$6.27	62.2%
MOBIL	$6.31	(Note[1])

1. Estimated return is infinitely high since the 1976 annual report of Mobil Alaska Pipeline indicates a negative equity position.

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In contrast to the excessive equity returns associated with the filed tariffs, rates of return on equity of 11%, 13% and 15% yield the following tariffs:

Owning Company	Profit Rate On Equity	Tariff
SOHIO	11%	$4.04
SOHIO	13%	4.06
SOHIO	15%	4.08
BP	11%	$4.42
BP	13%	4.56
BP	15%	4.71
ARCO	11%	$3.74
ARCO	13%	3.82
ARCO	15%	3.91
EXXON	11%	$3.80
EXXON	13%	3.90
EXXON	15%	3.99
MOBIL	11%[2]	$3.59
MOBIL	13%	3.59
MOBIL	15%	3.59

2. No equity investment.

Schedule 1

This schedule presents the distribution of Alyeska's estimated costs of annual operations of TAPS at a throughput of 1.2 million barrels per day. This column entitled "Alyeska" shows the distribution of estimated Alyeska costs by account developed from the cost data provided to the ICC by Exxon in its letter of June 1, 1977. The other columns in Schedule 1 show the pro-rata share of the Alyeska estimate for each owner based on the owner's

share in TAPS. For example, Sohio's share of Account 300, Salaries and Wages, is $3,068.95, which is 33.34% of Alyeska's estimate of $9,205.0.

Several of the accounts do not have estimated costs for Alyeska operations. Most notable are Accounts 540 (Depreciation and Amortization) and Account 660 (Prov. Removal & Restoration).

Schedule 2

Schedule 2 consists of three pages. The Schedule shows by account the accumulative cost data which have been submitted to date. The estimated costs are shown for each of the eight owners in three columns. Using Exxon as an example, the column entitled "Exxon-Alyeska Portion" is the pro-rata share of Alyeska costs from Schedule 1. The column "Exxon-Additional" presents the cost estimates provided by Exxon in their June 1, 1977 submission to the ICC. Column "Total" is the sum of the other two columns, indicating the total estimated costs to Exxon including their 20% share of Alyeska costs.

Of the eight owners, two (Sohio and Phillips) have not provided any of their own additional cost estimates. The six owners providing additional cost estimates for Account 660 (Prov. for Removal & Restoration) have used two different approaches. One approach (example Exxon) develops an annual estimated cost for Account 660 by assuming an escalation in the Alyeska estimate of $1.049 billion over the 25-year life of the pipeline. The other approach assumes that the owner's annual share of the $1.049 billion over the 25 years is the percentage ownership in TAPS without escalation. In our calculations of tariffs in Schedules 5A-9A, we used the latter approach in

determining the estimated costs for Account 660 for each owner. Therefore, in the calculations of the individual tariffs, the Removal & Restoration costs [Line (5), Schedules 5A-9A] do not agree with the estimates provided by the owners in Schedule 2.

Schedule 3

Schedule 3 shows the distribution of the estimated removal and restoration costs based on the Alyeska estimate of $1.049 billion. The total annual amount of $41,960 ($1,049,000 ÷ 25 = $41,960) is apportioned to the owners based on their shares of TAPS. The estimated amounts for each owner are used in Line (5) of the tariff calculations. We do not think it is appropriate to escalate the estimate removal and restoration costs (estimated in 1977 dollars) and set aside a constant amount each year for the 25 years without discounting the annual amount.

Schedule 4

The schedule presents the methodology used to calculate State Income Tax [Line (8)] and Federal Income Tax [Line (9)] in Schedules 5A-9A. The assumptions are that the Federal income tax rate is 48% and the state income tax rate is 9.4%.

Schedules 5A and 5B to 9A and 9B

In this series of schedules for five of the owners constituting about 95 percent of the ownership, there are calculations of debt costs in Schedules B which are used in the various cost and tariff calculations in Schedules A. In the first three columns of each Schedule A, tariffs are calculated assuming 11, 13 and 15 percent returns on equity. These calculations directly use certain minor costs from

Schedules 1 to 3. However, in the case of operating expenses, general expenses and depreciation and amortization, estimates were made in a consistent manner for all companies as detailed in the footnotes. Given the information available, the estimates are the best attainable at this time. In the last column of each Schedule A is a cost breakdown associated with the tariff filed by each owner.

In calculating tariffs at an 11, 13 and 15 percent return on equity, one sees that the tariffs are well below the filed $6.00 to $6.40 range at $3.60 to $4.70. Our tariff differences across the companies seem realistic given the across company variation in the cost of capital and capital structure. Note that Mobil is a bit of an anamoly among the five as it has no equity capital. Thus, the fourth column on Schedule 9A is unattainable.

Schedules 10 and 11

In Schedule 10, a debt cost for TAPS (consolidated) is calculated. The debt cost for each company is derived from Schedules 5B to 9B. On Schedule 11, the consolidated debt cost is used to calculate single tariffs at overall rates of return of 13 and 14 percent on rate base given a consolidated debt ratio of 85%. In the calculations, the rate base was estimated using Exxon's reporting of depreciation and amortization and assuming a twenty-five year amortization and depreciation period. Estimated expenses for the consolidated company were used. Again, operating costs and depreciation had to be estimated as detailed in the footnotes. The bottom line shows tariffs of $5.86 and $6.30 at 13 and 14 percent overall rates of return. This implies equity rates of return of 37.4 and 44.0 percent, respectively.

Schedule 12

This schedule shows a cents per barrel breakdown for each of the major owners under the assumption of an 11 percent return on the equity investment.

Schedule 1

DISTRIBUTION[1] OF 1978 ESTIMATED ALYESKA COSTS
AT 1.2 MILLION BARRELS PER DAY AMONG OWNERS OF TAPS
($000)

Acct. No.	Account Designation	Alyeska[2]	Sohio (33.34%)	BP (15.84%)	ARCO (21%)	PHILLIPS (1.66%)	UNION (1.66%)	MOBIL (5%)	EXXON (20%)	HESS (1.5%)
	OPERATIONS									
300	Sal. & Wages	$ 9,205.0	$ 3,068.95	$ 1,458.07	$ 1,933.05	$ 152.80	$ 152.80	$ 460.25	$ 1,841.00	$ 138.08
310	Suppl. & Exp.	5,918.0	1,973.06	937.41	1,242.78	98.24	98.24	295.90	1,183.60	88.77
320	Outside Serv.	5,471.0	1,824.02	866.61	1,148.91	90.82	90.82	273.55	1,094.20	82.07
330	Oper. Fuel & Power	28,528.0	9,511.24	4,518.84	5,990.88	473.56	473.56	1,426.40	5,705.60	427.92
340	Oil L & S									
	TOTAL	$49,122.0	$16,377.27	$ 7,780.93	$10,315.62	$ 815.42	$ 815.42	$ 2,456.10	$ 9,824.40	$ 736.84
	MAINTENANCE									
400	Sal. & Wages	$ 6,643.0	$ 2,214.78	$ 1,052.25	$ 1,395.03	$ 110.27	$ 110.27	$ 332.15	$ 1,328.60	$ 99.65
410	Supp. & Exp.	3,917.0	1,305.93	620.45	822.57	65.02	65.02	195.85	783.40	58.76
420	Outside Serv.	77,418.0	25,811.16	12,263.01	16,257.78	1,285.14	1,285.14	3,870.90	15,483.60	1,161.27
430	Maint. Mat'ls.	8,661.0	2,887.54	1,371.90	1,818.81	143.77	143.77	433.05	1,732.20	129.92
	TOTAL	$96,639.0	$32,219.45	$15,307.61	$20,294.19	$1,604.20	$1,604.20	$ 4,831.95	$19,327.80	$1,449.60
	GENERAL									
500	Sal. & Wages	$17,897.0	$ 5,966.86	$ 2,834.88	$ 3,758.37	$ 297.09	$ 297.09	$ 894.85	$ 3,579.40	$ 268.46
510	Supp. & Exp.	6,758.0	2,253.12	1,070.47	1,419.18	112.18	112.18	337.90	1,351.60	101.37
520	Outside Serv.	24,303.0	8,102.61	3,849.60	5,103.63	403.43	403.43	1,215.15	4,860.60	364.55
530	Rentals	7,333.0	2,444.82	1,161.55	1,539.93	121.73	121.73	366.65	1,466.60	109.99
540	Deprec. & Amort.	6,158.0	2,053.08	975.43	1,293.18	102.22	102.22	307.90	1,231.60	92.37
550	Pensions & Ben.	4,000.0	1,333.60	633.60	840.00	66.40	66.40	200.00	800.00	60.00
560	Insurance									
570	Casualty & Loss	2,283.0	761.14	361.63	479.43	37.90	37.90	114.15	456.60	34.25
580	Pipeline Taxes	$68,732.0	$22,915.23	$10,887.16	$14,433.72	$1,140.95	$1,140.95	$ 3,436.60	$13,746.40	$1,030.95
	TOTAL									
	OTHER									
650	Interest Exp.	$ 9,304.0	$ 3,101.95	$ 1,473.75	$ 1,953.84	$ 154.45	$ 154.45	$ 465.20	$ 1,860.80	$ 139.56
660	Prov. Removal & Res.									
	TOTAL	$ 9,304.0	$ 3,101.95	$ 1,473.75	$ 1,953.84	$ 154.45	$ 154.45	$ 465.20	$ 1,860.80	$ 139.56
	GRAND TOTAL	$223,797.0	$74,613.90	$35,449.45	$46,997.37	$ 3,715.02	$ 3,715.02	$11,189.85	$44,759.40	$ 3,356.99

[1]Distribution based on ownership. [2]Developed from Exxon June 1, 1977 submission to ICC (letter by J. D. Sturtevant).

Schedule 2
Page 1 of 3

DISTRIBUTION OF TOTAL TAPS 1978 ESTIMATED COSTS
AT 1.2 MILLION BARRELS PER DAY AMONG TAPS OWNERS
BASED ON SUBMISSIONS TO ICC
($000)

Acct. No.	Account Designation	Sohio-Alyeska Portion	Sohio Additional[1]	Sohio Total	BP-Alyeska Portion	BP Additional	BP Total[2]	Alyeska Portion	ARCO Additional[3]	Total
	OPERATIONS									
300	Sal. & Wages	$ 3,068.95			$ 1,458.07		$ 1,458.0	$ 1,933.05		
310	Suppl. & Exp.	1,973.06			937.41		937.0	1,242.78		
320	Outside Serv.	1,824.02			866.61		867.0	1,148.91		
330	Oper. Fuel & Power	9,511.24			4,518.84		6,261.0	5,990.88		
340	Oil L & S									
	TOTAL	$16,377.27			$ 7,780.93		$ 9,523.0	$10,315.62		
	MAINTENANCE									
400	Sal. & Wages	$ 2,214.78			$ 1,052.25		$ 1,052.0	$ 1,395.03		
410	Supp. & Exp.	1,305.93			620.45		732.0	822.57		
420	Outside Serv.	25,811.16			12,263.01		12,263.0	16,257.78		
430	Maint. Mat'ls.	2,887.58			1,371.90		1,261.0	1,818.81		
	TOTAL	$32,219.45			$15,307.61		$15,308.0	$20,294.19		
	GENERAL									
500	Sal. & Wages	$ 5,966.86			$ 2,834.88		$ 3,535.0	$ 3,758.37		
510	Supp. & Exp.	2,253.12			1,070.47		1,651.0	1,419.18		
520	Outside Serv.	8,102.61			3,849.60		4,594.0	5,103.63		
530	Rentals	2,444.82			1,161.55		1,239.0	1,539.93		
540	Deprec. & Amort.						52,000.0			
550	Pensions & Ben.	2,053.08			975.43		1,135.0	1,293.18		
560	Insurance	1,333.60			633.60		1,307.0	840.00		
570	Casualty & Losss									
580	Pipeline Taxes	761.14			361.63		26,331.0	479.43		
	TOTAL	$22,915.23			$10,887.16		$91,892.0	$14,433.72		
	OTHER									
650	Interest Exp.	$ 3,101.95			$ 1,473.75		$118,889.0	$ 1,953.84		
660	Prov. Removal & Res.						7,178.0			
	TOTAL	$ 3,101.95			$ 1,473.75		$126,067.0	$ 1,953.84		
	GRAND TOTAL	$74,613.90			$35,449.45			$46,997.37		

Schedule 2
Page 2 of 3

DISTRIBUTION OF TOTAL TAPS 1978 ESTIMATED COSTS
AT 1.2 MILLION BARRELS PER DAY AMONG TAPS OWNERS
BASED ON SUBMISSIONS TO ICC
($000)
(CONTINUED)

Acct. No.	Account Designation	Alyeska Portion	Exxon Additional[4]	Total[4]	Alyeska Portion	Mobil Additional[5]	Total	Alyeska Portion	Union Additional[6]	Total
	OPERATIONS									
300	Sal. & Wages	$ 1,841.0			$ 460.3		$ 460.3	$ 152.80		$ 152.80
310	Suppl. & Exp.	1,183.6			295.90		695.0	98.24		98.24
320	Outside Serv.	1,094.2			273.6		273.6	90.82		90.82
330	Oper. Fuel & Power	5,705.6	$ 4,500.0	$10,205.6	1,426.40		1,290.0	473.56		667.57
340	Oil L & S									
	TOTAL	$ 9,824.4	$ 4,500.0	$14,324.4	$ 2,456.20		$ 2,718.9	$ 815.42		$ 1,009.43
	MAINTENANCE									
400	Sal. & Wages	$ 1,328.60			$ 322.15		$ 322.2	$ 110.27		$ 110.27
410	Supp. & Exp.	783.40			195.85		231.0	65.02		65.02
420	Outside Serv.	15,483.60			3,870.90		3,870.9	1,285.14		1,285.15
430	Maint. Mat'ls.	1,732.20			433.05		397.9	143.77		143.77
	TOTAL	$19,327.80		$19,327.8	$ 4,831.95		$ 4,832.0	$ 1,604.20		$ 1,604.21
	GENERAL									
500	Sal. & Wages	$ 3,579.40	$ 395.0	$ 3,974.4	$ 894.85		$ 894.9	$ 297.09		$ 297.09
510	Supp. & Exp.	1,351.60	50.0	1,401.6	337.90		337.9	112.18		112.18
520	Outside Serv.	4,860.60	140.0	5,000.6	1,215.15		1,571.2	403.43		439.43
530	Rentals	1,466.60	30.0	1,496.6	366.65		366.6	121.73		121.73
540	Deprec. & Amort.		73,700.0	73,700.0		$18,080.0	18,080.0		$ 5,750.0	5,750.0
550	Pensions & Ben.	1,231.60	110.0	1,341.6	307.90		307.90	102.22		102.22
560	Insurance	800.00		800.00	200.00		400.00	66.40		66.40
570	Casualty & Losss									
580	Pipeline Taxes	456.60	31,900.0	32,356.6	114.15		8,269.5	37.90		2,745.49
	TOTAL	$13,746.40	$106,325.0	$120,071.4	$ 3,436.60		$30,228.0	$ 1,140.95		$ 9,634.54
	OTHER									
650	Interest Exp.	$ 1,860.80	$114,500.0	$116,360.8	$ 465.20		$32,674.0	$ 154.45		$ 9,618.44
660	Prov. Removal & Res.		16,400.0	16,400.0			8,513.5			697.00
	TOTAL	$ 1,860.80	$141,725.0	$132,760.8	$ 465.20		$41,187.5	$ 154.45		$10,315.44
	GRAND TOTAL	$44,759.40			$11,199.85			$ 3,715.02		

Protest of the State of Alaska Seeking Suspension.

Schedule2
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DISTRIBUTION OF TOTAL TAPS 1978 ESTIMATED COSTS
AT 1.2 MILLION BARRELS PER DAY AMONG TAPS OWNERS
BASED ON SUBMISSIONS TO ICC
($000)
(CONTINUED)

Acct. No.	Account Designation	Alyeska Portion	Exxon Additional[7]	Total	Alyeska Portion
	OPERATIONS				
300	Sal. & Wages	$ 138.08		$ 138.0	$ 157.80
310	Suppl. & Exp.	88.77		89.0	98.24
320	Outside Serv.	82.07		82.0	90.82
330	Oper. Fuel & Power	427.92	$ 165.0	593.0	473.56
340	Oil L & S				
	Total	$ 736.84	$ 165.0	$ 902.8	$ 815.42
	MAINTENANCE				
400	Sal. & Wages	99.65			$ 110.27
410	Supply Exp.	58.76			65.02
420	Outside Serv.	1,161.27			1,285.14
430	Maint. Mat'ls.	129.92			143.77
	TOTAL	$1,449.60		$1,857.6	$1,604.20
	GENERAL				
500	Sal. & Wages	$ 268.46		$ 268.0	$ 297.09
510	Supp. & Exp.	101.37		101.0	112.18
520	Outside Serv.	364.55	$ 483.0	848.0	403.43
530	Rentals	109.99		110.0	121.73
540	Deprec. & Amort.		5,754.0	5,754.0	
550	Pensions & Ben.	92.37		92.0	102.22
560	Insurance	60.00	48.0	108.0	66.40
570	Casualty & Loss				
580	Pipeline Taxes	34.25		2,481.0	37.90
	TOTAL	$1,030.99		$9,962.0	$1,140.95
	OTHER				
650	Interest Exp.	$ 139.56	$11,288.0	$11,428.0	$ 154.45
660	Prov. Renewal & Res.		629.0	629.0	
	TOTAL	$ 139.56	$11,917.0	$12,057.0	$ 154.45
	GRAND TOTAL	$ 356.99			$ 3,715.02

[1]Not available.

[2]May 27, 1977 submission to ICC (letter by P. H. Jones).

[3]Not available.

[4]June 1, 1977 submission to ICC (letter by J. D. Sturtevant).

[5]April 29, 1977 submission to ICC (letter by C. R. Thompson).

[6]May 27, 1977 submission to ICC (letter by E. J. Takachi

[7]June 1, 1977 submission to ICC (letter by R. E. Stafford).

[8]Not available.

Protest of the State of Alaska Seeking Suspension.

Schedule 3

DISTRIBUTION OF ALYESKA ESTIMATED
REMOVAL & RESTORATION COSTS
($000)

	Distribution Of Annual Amount[1]
Sohio	$13,989
BP	6,646
ARCO	8,012
HESS	629
EXXON	8,392
MOBIL	2,098
UNION	697
PHILLIPS	697
TOTAL	$41,960[2]

[1]Distribution based on ownership percentages.

[2]$1,049,000 of Alyeska estimate (June 1, 1977 Exxon submission to ICC, letter by J. D. Sturtevant) divided by 25 years.

Protest of the State of Alaska Seeking Suspension.

Schedule 4

FEDERAL & STATE INCOME TAX FORMULAS

(1) Equity Return (ER) =	Net Income Before Taxes (NIBT) minus Income Taxes (IT)
(2) IT =	Federal Income Taxes (FIT) plus State Income Taxes (SIT)
(3) FIT =	.48 (NIBT-SIT)
(4) SIT =	.094 NIBT
(5) ER =	NIBT - .48(NIBT - .094 NIBT) - .094 NIBT
(6) ER =	.47112 NIBT
(7) NIBT =	2.1226 ER

Protest of the State of Alaska Seeking Suspension.

Schedule 5A

SOHIO
ESTIMATED TAPS TARIFF CALCULATION
($000)

Costs		Common Equity Returns 11%	13%	15%	26.4%
(1) Operating[1]	$ 23,892	→			
(2) Maintenance[2]	32,220	→			
(3) General[3]	77,399	→			
(4) Deprec. & Amt.[4]	128,141	→			
(5) Removal & Restoration[5]	13,989	→			
(6) Interest[6]	301,059				
(7) Sub-Total	$576,700	→			
(8) State Income Tax[7]	1,266	$ 1,496	$ 1,726	$ 30,349	
(9) Federal Income Tax[8]	5,855	6,921	7,984	140,405	
(10) Equity Return[9]	6,343	7,496	8,649	152,099	
(11) Total	$590,164	$592,613	$595,059	$899,545	
(12) Barrels Per Year[10]	146,030	→			
(13) Tariff (11)÷(12)	$4.04	$4.06	$4.08	$6.16	

[1] Sohio portion of Alyeska costs (Schedule 1) plus 1.67 of Exxon's additional costs (Schedule 2), 1.67 = 33.34% Sohio/20% Exxon.

[2] Schedule 1.

[3] Sohio portion of Alyeska costs (Schedule 1) excluding dep. & amt. but plus 1.67 of Exxon's additional costs (Schedule 2).

[4] Depreciation of $109,460 determined as 2.105 of BP's depreciation (Schedule 2) 2.105 = 33.34% Sohio/15.84% BP. Amortization of $18,681 estimates as follows:

Exxon's depr. & amt. (Sch.	771,700	*1.2626-
Less Exxon's est. depr. a		20% Exxon,
1.263* of BP's $52,000 d		15.84% BP
(Sch. 2)	65,657	
Est. Exxon Amort.	8,043	
Ratio of Sohio Weighted Debt costs to Exxon weighted debt costs (Sch. 5C)	2.3225	
Est. Sohio Amort.	$18,681	

[5] See Schedule 3.

[6] Determined as follows:

$128,141	Dep. & Amt.
x 25	years
$3,203,525	Investment in Plant
x .982	Debt Ratio
$3,145,862	Debt Capital
x .0957	Debt Cost
$301,059	Interest

[7] See Schedule 4.

[8] See Schedule 4.

[9] Determined as follows:

$3,203,525	Investment in Plant
x .018	Equity Ratio
57,663	Equity Capital
x k	Equity Cost
[illegible]	Equity Return

[10] Based on Sohio's share of 1.3 million barrels per day.

Protest of the State of Alaska Seeking Suspension.

Schedule 5B

SOHIO PIPE LINE
COST OF CAPITAL
1976

	Amount (000)	% Of Total	Annual Cost Rate %	Cost Factor	Wtd. Cost
Long Term Debt	$2,466,892[1]	91.8%	9.9%	9.09	
Short Term Debt	173,204	6.4	4.83	0.31	
Preferred Stock	0				
Common Equity	47,302	1.8			
Totals	$2,687,398	100.0%			
Common Equity ROR 11%		1.8	11.0	0.20	9.60
12%		1.8	12.0	0.22	9.62
13%		1.8	13.0	0.23	9.63
14%		1.8	14.0	0.25	9.65
15%		1.8	15.0	0.27	9.67

[1]This is the rate given by a weighted average of the long term rates for the year, as reported by the Company. Rates not reported and the respective amounts outstanding were omitted in the computation of this average.

Source: Annual Report of Sohio Pipe Line Co. to the ICC, 1976.

Protest of the State of Alaska Seeking Suspension.

Schedule 5C

RATIO FOR ESTIMATING AMORTIZATION
($000)

(1) Exxon Estimated Amortization	$8,043
(2) Exxon Ownership	.20
(3) Exxon Debt Ratio	.838
(4) Exxon Debt Cost	.0805
(5) Exxon Cost Weighting Factor (2)x(3)x(4)	.01349
(6) Sohio Ownership	.3334
(7) Sohio Debt Ratio	.982
(8) Sohio Debt Cost	.0957
(9) Sohio Cost Weighting Factor (6)x(7)x(8)	.03133
(10) Ratio (9)÷(5)	2.3225

Protest of the State of Alaska Seeking Suspension.

Schedule 6A

BP
ESTIMATED TAPS TARIFF CALCULATION

Costs	Common Equity Returns 11%	13%	15%	37.6%
(1) Operating[1]	$ 9,523	→		
(2) Maintenance[2]	15,308	→		
(3) General[3]	39,892	→		
(4) Deprec. & Amt.[4]	59,606	→		
(5) Removal & Restoration[5]	6,646	→		
(6) Interest[6]	120,015	→		
(7) Sub-Total	$250,990	→		
(8) State Income Tax[7]	5,210	6,158	7,105	17,820
(9) Federal Income Tax[8]	24,105	28,487	32,869	82,441
(10) Equity Return[9]	26,112	30,860	35,607	89,312
(11) Total	$306,417	$316,495	$326,571	$440,563
(12) Barrels Per Year[10]	69,380	→		
(13) Tariff (11)÷(12)	$4.42	$4.56	$4.71	$6.35

[1] BP operating costs from Schedule 2.

[2] BP maintenance costs from Schedule 2.

[3] BP costs (Schedule 2) less deprec. costs.

[4] Depreciation of $52,000 from Schedule 2.
Amortization of $7,606 estimated as follows:

Exxon dep. & amort. (Sch. 2)	$73,700
Less Exxon's est. deprec. at 1.26 of BP's $52,000 (Sch. 2)	65,657
Est. Exxon amort.	8,043
Ratio of BP weighted cost to Exxon's weighted debt costs (Sch. 6C)	.9457
	$7,606

[5] Schedule 3.

[6] Determined as follows:

$ 59,606	Debt and Amort.
x 25	Years
$1,490,150	Investment in Plant
x .8407	Debt Ratio
1,252,769	Debt Capital
x .0958	Debt Cost
120,015	Interest

[7] See Schedule 4.

[8] See Schedule 4.

[9] Determined as follows:

$1,490,150	Investment in Plant.
x .1593	Equity Ratio
237,381	Equity Capital
x k	Equity Cost
ER	

[10] Based on BP's share of 1.2 million

NOTE: Totals may not add due to rounding.

Protest of the State of Alaska Seeking Suspension.

Schedule 6B

BP PIPE LINES, INC.
COST OF CAPITAL
12/31/76

	Amount (000)	% Of Total	Annual Cost Rate %	Cost Factor	Wtd. Cost
Long Term Debt	$ 866,824	73.89%	10.21%	7.54	
Short Term Debt[1]	119,459	10.18	5.05[2]	0.51	
Common Equity	186,793	15.93			
Totals	$1,173,076	100.0%			
Common Equity ROR 11%		15.93	11.00	1.75	9.80
12%		15.93	12.00	1.91	9.96
13%		15.93	13.00	2.07	10.12
14%		15.93	14.00	2.23	10.28
15%		15.93	15.00	2.39	10.44

[1] Commercial Paper Only.

[2] Note E to the Balance Sheet.

Source: 1976 Form 10K (SEC) of the Company.

Protest of the State of Alaska Seeking Suspension.

Schedule 6C

RATIO FOR ESTIMATING AMORTIZATION
($000)

(1)	Exxon Estimated Amortization	$8,043
(2)	Exxon Ownership	.20
(3)	Exxon Debt Ratio	.838
(4)	Exxon Debt Cost	.0805
(5)	Exxon Cost Weighting Factor (2)x(3)x(4)	.01349
(6)	BP Ownership	.1584
(7)	BP Debt Ratio	.8407
(8)	BP Debt Cost	.0958
(9)	BP Cost Weighting Factor (6)x(7)x(8)	.01276
(10)	Ratio (9)÷(5)	.9457

Protest of the State of Alaska Seeking Suspension.

Schedule 7A

ARCO
ESTIMATED TAPS TARIFF CALCULATION

Costs	Common Equity Returns 11%	13%	15%	66.0%
(1) Operating[1]	$ 15,041	→	→	→
(2) Maintenance[2]	20,294	→	→	→
(3) General[3]	48,690	→	→	→
(4) Deprec. & Amt.[4]	77,453	→	→	→
(5) Removal & Restoration[5]	8,812	→	→	→
(6) Interest[6]	131,470	→	→	→
(7) Sub-Total	$301,760	→	→	→
(8) State Income Tax[7]	3,974	4,696	5,418	23,858
(9) Federal Income Tax[8]	18,384	21,727	25,069	110,377
(10) Equity Return[9]	19,915	23,536	27,157	119,570
(11) Total	$344,033	$351,719	$359,404	$555,559
(12) Barrels Per Year[10]	91,980	→	→	→
(13) Tariff (11)÷(12)	$3.74	$3.82	$3.91	$6.04

[1] Arco portion of Alyeska costs (Sch. 1) plus 1.05 of Exxon's add't. costs (Sch. 2), 1.05 = 21% Arco/20% Exxon.

[2] Schedule 1.

[3] Arco portion of Alyeska costs (Sch. 1) excluding dep. & amort. but plus 1.05 of Exxon's add't. costs (Sch. 2).

[4] Deprec. of $68,952 determined as 1.326 of BP's deprec. (Sch. 2), 1.326 = 21% Arco/15.84% BP.
Amortization of $8501 est. as follows:

Exxon dep. and amort. (Sch. 2)	$73,700
Less Exxon's est. deprec. at 1.2626 of BP's $52,000 deprec. (Sch. 2)	65,657
Est. Exxon Amort.	8,043
Ratio of Arco weighted debt cost to Exxon's weighted debt costs (Sch. 7C)	1.057
	$8,501

[5] See Schedule 3.

[6] Determined as follows:

$ 77,453	Dep. & Amort.
x 25	Years
$1,936,325	Investment in Plant
x .9065	Debt Ratio
1,755,279	Debt Capital
x .0749	Debt Cost
$ 131,470	

[7] See Schedule 4.

[8] See Schedule 4.

[9] Determined as follows:

$1,936,325	Investment in Plant
x .0935	Equity Ratio
181,047	Equity Capital
x k	
ER	

[10] Based on ARCO's share of 1.2 million barrels per day.

Protest of the State of Alaska Seeking Suspension.

Schedule 7B

ARCO PIPELINE
COST OF CAPITAL
12/31/76

	Amount (000)	% Of Total	Annual Cost Rate %	Cost Factor	Wtd. Cost
Long Term Debt	$1,286,947	75.85%	8.05%	6.11	
Short Term Debt	251,037[1]	14.80	4.59	0.68	
Common Equity	158,779	9.35			
Totals	$1,696,763	100.00%			
Common Equity ROR 11%		9.35	11.00	1.03	7.82
12%		9.35	12.00	1.12	7.91
13%		9.35	13.00	1.22	8.01
14%		9.35	14.00	1.31	8.10
15%		9.35	15.00	1.40	8.19

[1]This figure includes unamortized debt discounts, as reported by Company, p. 6 of 12K, 1976.

Source: Form 10K of the Company, 1976.

Protest of the State of Alaska Seeking Suspension.

Schedule 7C

RATIO FOR ESTIMATING AMORTIZATION
($000)

(1) Exxon Estimated Amortization	$8,043
(2) Exxon Ownership	.20
(3) Exxon Debt Ratio	.838
(4) Exxon Debt Cost	.0805
(5) Exxon Cost Weighting Factor (2)x(3)x(4)	.01349
(6) ARCO Ownership	.21
(7) ARCO Debt Ratio	.9065
(8) ARCO Debt Cost	.0749
(9) ARCO Cost Weighting Factor (6)x(7)x(8)	.0143
(10) Ratio (9)÷(5)	1.057

Protest of the State of Alaska Seeking Suspension.

Schedule 8A

EXXON
ESTIMATED TAPS TARIFF CALCULATION

Costs	Common Equity Returns 11%	13%	15%	62.2%
(1) Operating[1]	$ 14,324 →			
(2) Maintenance[2]	19,328 →			
(3) General[3]	46,371 →			
(4) Deprec. & Amt.[4]	73,700 →			
(5) Removal & Restoration[5]	8,392 →			
(6) Interest[6]	124,293 →			
(7) Sub-Total	$286,408 →			
(8) State Income Tax[7]	4,368	5,162	5,956	24,707
(9) Federal Income Tax[8]	20,206	23,880	27,554	114,306
(10) Equity Return[9]	21,889	25,869	29,849	123,631
(11) Total	$332,871	$341,319	$349,767	$549,252
(12) Barrels Per Year[10]	87,600 →			
(13) Tariff (11)÷(12)	$3.80	$3.90	$3.99	$6.27

[1] Exxon operating costs, Schedule 2.

[2] Exxon maintenance costs, Schedule 2.

[3] Exxon costs (Schedule 2) less deprec. and amort.

[4] Exxon deprec. and amort. costs (Sch. 2).

[5] See Schedule 3.

[6] Determined as follows:
$ 73,700 Dep. & Amort.
x 25 Years
$1,842,500 Investment in Plant
x .838 Debt Ratio
1,544,015 Debt Capital
x .0805 Debt Cost
$ 124,293 Interest

[7] See Schedule 4.

[8] See Schedule 4.

[9] Determined as follows:
$1,842,500 Investment in Plant
x .108 Equity Ratio
198,990 Equity Capital
x k
ER

[10] Based on Exxon's share of 1.2 million barrels per day.

NOTE: Totals may not add due to rounding.

Protest of the State of Alaska Seeking Suspension.

Schedule 8B

EXXON PIPELINE
COST OF CAPITAL
1976

	Amount (000)	% Of Total	Annual Cost Rate %	Cost Factor	Wtd. Cost
Long Term Debt	$1,355,327[1]	79.1%	8.25[2]%	6.53	
Short Term Debt	81,050	4.7	4.7	0.22	
Preferred Stock	0		0	0	
Deferred Tax Credits	92,441	5.4	0	0	
Common Equity	184,586	10.8			
Totals	$1,713,404	100.0%			
Common Equity ROR 11%		10.8	11.0	1.19	7.94
12%		10.8	12.0	1.30	8.03
13%		10.8	13.0	1.40	8.15
14%		10.8	14.0	1.51	8.20
15%		10.8	15.0	1.62	8.37

[1] Includes long term debt due within one year.

[2] The rate given by a weighted average of the rates paid for the year, as reported by the Company in source noted below.

Source: 1976 Annual Report, Form P, of Company to Interstate Commerce Commission.

Protest of the State of Alaska Seeking Suspension.

Schedule 9A

MOBIL
ESTIMATED TAPS TARIFF CALCULATION

Costs		Common Equity Returns 11%	13%	15%	J
(1) Operating[1]	$ 2,719	→			
(2) Maintenance[2]	4,832	→			
(3) General[3]	12,148	→			
(4) Deprec. & Amt.[4]	18,823	→			
(5) Removal & Restoration[5]	2,098	→			
(6) Interest[6]	38,022	→			
(7) Sub-Total	$ 78,642	→			
(8) State Income Tax[7]					$ 5,598
(9) Federal Income Tax[8]					25,896
(10) Equity Return[9]					28,055[11]
(11) Total	$ 78,642	→			138,189
(12) Barrels Per Year[10]	21,900	→			
(13) Tariff (11)÷(12)	$3.59	→			$6.31

[1] Mobil operating costs from Sch. 2.

[2] Mobil maint. costs from Sch. 2.

[3] Mobil costs Sch. 2 less deprec. costs.

[4] Deprec. of $16,414*
Amort. of $2409 est. as follows:

Exxon dep. & amort. (Sch. 2)	$73,700
Less Exxon est. at 1.26 of BP's $52,000 (Sch. 2)	65,657
Estimated Exxon amort.	[illegible]
Ratio of Mobil weighted debt cost to Exxon's weighted debt cost (Sch. 9C)	.895
	$ 2,409

[5] See Schedule 3.

[6] Determined as follows:
$18,823 Depr. and Amort.
x 25 Years
$470,575 Debt Capital
x .0808 Debt Cost
$38,022 Interest

[7] Not applicable.

[8] Not applicable.

[9] No equity, see Schedule 9B.

[10] Based on Mobil's share of 1.2 million barrels per day.

[11] Profit.

*Calculated as $16,414 = $52,000 (BP's deprec.) x (.316); 5% Mobil/15.84% BP = .316

Protest of the State of Alaska Seeking Suspension.

Schedule 9B

MOBIL ALASKA PIPE LINE CO.
COST OF CAPITAL
1976

		Amount (000)	% Of Total	Annual Cost Rate %	Cost Factor	Wtd. Cost
Long Term Debt		$300,000	90.5%	8.45%[1]	7.65	
Short Term Debt		31,622	9.5	4.525[2]	0.43	
Preferred Stock		0				
Deferred Taxes		0				
Common Equity		000[3]				
Totals		$331,622	100.0%			
Common Equity ROR	11%		0.00	11.0	0.00	8.08
	12%		0.00	12.0	0.00	8.08
	13%		0.00	13.0	0.00	8.08
	14%		0.00	14.0	0.00	8.08
	15%		0.00	15.0	0.00	8.08

[1] Rate reported in Form 10K, Mobil Company, 1976, p. D-5.

[2] Midpoint of 4.375 - 4.675% paid for short term debt as reported in Form 10K, Mobil Corp., 1976, p. D-5.

[3] Actual figure is shown as negative $3,888,000 on Balance Sheet of Mobil Alaska Pipeline Co., as reported in Form 10K, Mobil Corp., 1976, P. D-8.

Source: Form 10K of Mobil Corp. 1976.

Schedule 9C

RATIO FOR ESTIMATING AMORTIZATION
($000)

(1) Exxon Estimated Amortization	$8,043
(2) Exxon Ownership	.20
(3) Exxon Debt Ratio	.838
(4) Exxon Debt Cost	.0805
(5) Exxon Cost Weighting Factor (2)x(3)x(4)	.01349
(6) Mobil Ownership	.05
(7) Mobil Debt Ratio	1.00
(8) Mobil Debt Cost	.0808
(9) Mobil Cost Weighting Factor (6)x(7)x(8)	.00404
10) Ratio (9)÷(5)	.2995

Schedule 10

CONSOLIDATED EMBEDDED
COST OF DEBT
TRANS ALASKA PIPELINE
1976

Pipeline Company	% Of Total Ownership	Annual Cost Rate	Cost Factor
SOHIO	33.34%	9.57%	3.19
BP	15.84	9.58	1.52
ARCO	21.00	7.49	1.57
EXXON	20.00	8.05	1.61
MOBIL	5.00	8.08	0.40
Others[1]	4.82	8.55	0.41
Totals	100.00%		8.70

[1]The 4.82% portion of ownership not owned by the above five companies was figured at the average embedded cost of the five for which data were available.

Protest of the State of Alaska Seeking Suspension.

Schedule 11

ESTIMATE OF CONSOLIDATED TAPS TARIFF
AT RETURNS OF 13 AND 14 PERCENT ON RATE BASE

Costs	Rates of Return 13%	14%
(1) Total Operating[1]	$ 377,618	$ 377,618
(2) Deprec. & Amt.	368,500	368,500
(3) Removal & Restoration[3]	41,960	41,960
(4) Interest[4]	681,264	681,264
(5) Sub-Total	$1,469,342	$1,469,342
(6) State Income Tax[5]	103,026	121,408
(7) Federal Income Tax[6]	476,641	561,679
(8) Equity Return[7]	516,361	608,486
(9) Total	$2,565,370	$2,760,915
(10) Barrels Per Year[8]	438,000	438,000
(11) Tariff (9)÷(10)	$5.86	$6.30

[1] Alyeska costs (Sch. 1) plus 5 times Exxon's add't. costs (not including deprec. and amort.), Sch. 2.

[2] Based on Exxon's deprec. and amort. of $73,700. ($73,700)÷(20%)=$368,500

[3] See Schedule 3.

[4] Determined as follows:

$ 73,700	Exxon deprec. and amort.
x 5	
368,500	Total Annual
x 25	Years
$9,212,500	TAPS rate base (RB)
x .85	Debt ratio (assumed)
$7,830,625	Debt Capital
x .087	See Sch. 10
$ 681,264	Interest Cost

[5] See Schedule 4.

[6] See Schedule 4.

[7] Determined as follows:

$9,212,500	RB
x .13	Rate of Return
$1,197,625	ER & Interest Costs
- 681,264	Interest Cost
$ 516,361	ER
$9,212,500	RB
x .14	Rate of Return
$1,289,750	ER & Interest Costs
- 681,264	Interest Cost
$ 608,486	ER

[8] Annual throughput at 1.2 million barrels per day.

Protest of the State of Alaska Seeking Suspension.

Schedule 12

DISTRIBUTION OF TAPS COSTS (¢/B)
AT 11 PERCENT RETURN ON EQUITY

	Sohio	BP	Arco	Exxon	Mobil
Operating	16.36¢	13.73¢	16.35¢	16.35¢	12.42¢
Maintenance	22.06	22.06	22.06	22.06	22.06
General	53.00	57.50	52.94	52.93	55.47
Deprec. & Amt.	87.75	85.91	84.21	84.13	85.95
Removal & Rest.	9.58	9.58	9.58	9.58	9.58
Interest	206.16	172.98	142.93	141.89	173.62
Sub Total	394.92	361.76	328.07	326.95	359.10
State Income Tax	.87	7.51	4.32	4.99	0
Federal Income Tax	4.01	34.74	19.99	23.07	0
Equity Return	4.34	37.64	21.65	24.99	0
Total	404.14¢	441.65¢	374.03¢	379.99¢	359.10¢

Protest of the State of Alaska Seeking Suspension.

VERIFICATION

MICHAEL J. ILEO, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

MICHAEL J. ILEO

Michael J. Ileo

Subscribed and sworn to before me this day of June, 1977.

[illegible]

Notary Public

My Commission Expires:
February 10,1978

Preliminary Statement of Special Counsel, Alaska Pipeline Commission in Response to Request of the State of Alaska, June 15, 1977.

PRELIMINARY STATEMENT OF TERRY F. LENZNER, SPECIAL COUNSEL, ALASKA PIPELINE COMMISSION IN RESPONSE TO REQUEST OF THE STATE OF ALASKA

Introduction

On November 22, 1976, the Alaska Pipeline Commission initiated an investigation into the costs associated with the design and construction of the Trans-Alaska Pipeline Systems (hereinafter "TAPS"). The Alaska Pipeline Commission has a two-fold interest in the costs of construction and design of TAPS. First, the Commission regulates the tariffs charged for the intrastate transportation of oil in the TAPS system and the design and construction costs are an important component of those tariffs. Second, the Commission is statutorially required to assist the Attorney General of the State of Alaska in intervening on behalf of the State of Alaska at Interstate Commerce Commission proceedings regarding the interstate tariff for TAPS. The cost of TAPS design and construction is an important component of the interstate tariff, and the level of this tariff affects the tax and royalty interest revenues which the State obtains from the production of North Slope oil.

To act as its Special Counsel in conducting the investigation, the Commission retained Terry F. Lenzner, a member of the Washington, D.C. law firm of Wald, Harkrader & Ross. The Alaska Pipeline Commission also retained the services of several independent consultants to assist the Special Counsel, including the following individuals and organizations:

1. *Dr. Robert Lind*: Professor, Graduate School of Business and Public Administration and Director, Energy Policy Studies Unit, Cornell University; Ithaca, New York.

2. *Aerospace Corporation*: Engineering and Economic consultants with extensive experience in Alaskan transportation, energy, and environmental matters; Los Angeles, California.

3. *VHS Associates*: Consultants in cost estimating and construction management of pipelines, terminals and comparable facilities; San Rafael, California.

4. *Resource Planning Associates*: Economic and management consultants with extensive experience in issues relating to the oil and gas industry; Cambridge, Massachusetts.

In the course of the TAPS investigation, considerable information has been obtained and analyzed. The sources of information include interviews of individuals presently or formerly connected with the TAPS construction effort and thousands of documents in the public domain or otherwise made available to the Special Counsel's staff which relate to the TAPS project. However, the evidence uncovered by the investigation to date makes clear that much information necessary to a complete analysis of the TAPS project is within the exclusive possession of the TAPS owner companies (both the pipeline companies, their corporate parents, and their affiliates) and their construction agent, Alyeska Pipeline Service Company (hereinafter "Alyeska").

Of the documents provided by Alyeska, some have had data deleted. Likewise, Alyeska has frustrated our efforts

to interview present and former Alyeska employees and employees of various Alyeska contractors.[1] Several of Alyeska's contractors, including Bechtel, Incorporated (hereinafter "Bechtel"), have proven equally uncooperative.

Through the use of compulsory process, we have been able to compel Alyeska to make available some information about TAPS. However, legal efforts to resist such process, while unsuccessful on the merits, have delayed completion of the Alaska Pipeline Commission's investigation, and denied our office a complete record of the TAPS construction effort.

Despite the foregoing obstacles and constraints, the Alaska Pipeline Commission's investigation has made substantial progress and has developed sufficient evidence to permit preliminary conclusions to be made at this time. Pursuant to the request of the Attorney General of the State of Alaska, the following paragraphs present, for the consideration of the Interstate Commerce Commission, a summary of the evidence which has been derived to date in connection with the Alaska 'Pipeline Commission's investigation. This evidence, in the Special Counsel's view, reveals a project characterized by an unnecessary duplication of management structure and responsibility, ineffective utilization of labor and equipment, an inexcusable absence of effective cost control procedures and incentives or other evidence of concern about excessive costs, a refusal to authorize adequate planning and design prior to construc-

1. Alyeska's tactics have either taken the form of outright interview refusals or of the imposition of unreasonable conditions on interview procedures. For example, Alyeska has prevented its contractors or its former employees from talking with the Special Counsel unless Alyeska representatives are present. In light of the obvious .opportunities for collusion or intimidation inherent in that procedure, the Special Counsel has declined to proceed in this manner.

tion, and an inexplicable failure to establish information and cost control systems essential for an efficient construction effort.

Under these circumstances, it is hardly surprising that the TAPS construction project has been plagued by monumental cost overruns. Originally projected to cost less than $900 million, the final construction cost estimates escalated to $3.5 billion in early 1974, to $6.4 billion in 1975 and to today's projection of $8 billion (without capitalized interest costs). While some of the ten-fold increase can be attributed to factors beyond the control of the TAPS owner companies and their agents, it seems clear that hundreds of millions of dollars were wasted as a result of mismanagement and an organizational lack of concern about economy or efficiency.

To document this conclusion, the evidence must be categorized and reviewed in detail. In this regard, however, two caveats must be kept in mind. First, because a "cost-plus" mentality appears to have pervaded nearly every aspect of the project, many excessive costs were incurred in a manner rendering them difficult to verify or to quantify. Nevertheless, such verification/quantification has been undertaken and will be reflected in the final report of the Special Counsel to the Alaska Pipeline Commission. Second, while it is necessary to categorize the evidence, a construction project consists of many parts which are intricately interrelated. Thus, every imprudent decision had not only a primary impact upon project costs, but also numerous "ripple" effects beyond a given cost category which each contributed to the sum of excessive expenditures. With these caveats in mind, we have organized the evidence derived by the investigation. The following paragraphs

summarize the evidence analyzed to date which relate to these subject areas:

I. Overall TAPS Organization and Structure
II. Construction Budget and Cost Controls
III. Construction Equipment, Spare Parts and Inventory Control
IV. Labor Productivity
V. Support Services
VI. Aboveground Design and Construction
VII. Welding
VIII. River Crossings
IX. Section 5.
X. Valdez Terminal

Protest of United Sates Department of Justice for Suspension of Tariffs for Transportation of Liquid Hydrocarbons and Gas from Prudhoe Bay to Valdez Marine Terminal, June 15, 1977.

[caption omitted in printing]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

PROTEST AND PETITION FOR SUSPENSION BY THE UNITED STATES DEPARTMENT OF JUSTICE

TARIFFS

(1)	Effective Date:	June 20, 1977.*
	Tariff Reference:	Page 1 to Tariff ICC No. 2 issued by BP Pipelines Incorporated.
	Commodity:	Petroleum (unrefined liquid hydrocarbons including gas liquids).
	Territory:	From: Prudhoe Bay, Alaska. To: Valdez Marine Terminal, Alaska.
(2)	Effective Date:	June 20, 1977.*
	Tariff Reference:	Page 1 to Tariff ICC No. 742 issued by Sohio Pipe Line Company.
	Commodity:	Petroleum (unrefined liquid hydrocarbons including gas liquids).
	Territory:	From: Prudhoe Bay, Alaska. To: Valdez Marine Terminal, Alaska.

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* On June 13, 1977, the Special Permission Board of the Commission approved the application of BP Pipelines Incorporated, Sohio Pipe Line Company and Mobil Alaska Pipeline Company for leave to file supplements to their tariffs to postpone the effective date of their tariffs from June 20, 1977 to June 30, 1977.

Protest of U. S. Department of Justice.

(3)	Effective Date:	June 20, 1977.*
	Tariff Reference:	Page 1 to Tariff ICC No. 2 issued by Mobil Alaska Pipeline Company.
	Commodity:	Petroleum (unrefined liquid hydrocarbons including gas liquids).
	Territory:	From: Prudhoe Bay, Alaska. To: Valdez Marine Terminal, Alaska.
(4,	Effective Date:	June 30, 1977.
	Tariff Reference:	Page 14 to Tariff ICC No. 1030 issued by Arco Pipe Line Company.
	Commodity:	Petroleum (unrefined liquid hydrocarbons including gas liquids).
	Territory:	From: Prudhoe Bay, Alaska. To: Valdez Marine Terminal, Alaska.
(5)	Effective Date:	July 1, 1977.
	Tariff Reference:	Page 2 to Tariff ICC No. 2 issued by Amerada Hess Pipeline Corporation.
	Commodity:	Petroleum (unrefined liquid hydrocarbons including gas liquids).
	Territory:	From: Prudhoe Bay, Alaska. To: Valdez Marine Terminal, Alaska.

(6)	Effective Date:	June 30, 1977.
	Tariff Reference:	Page 2 to Tariff ICC No. 125 issued by Exxon Pipeline Company.
	Commodity:	Petroleum (unrefined liquid hydrocarbons including gas liquids).
	Territory:	From: Prudhoe Bay, Alaska. To: Valdez Marine Terminal, Alaska.
(7)	Effective Date:	June 30, 1977.
	Tariff Reference:	Page 2 to Tariff ICC No. 2 issued by Union Alaska Pipeline Company.
	Commodity:	Petroleum (unrefined liquid hydrocarbons including gas liquids).
	Territory:	From: Prudhoe Bay, Alaska. To: Valdez Marine Terminal, Alaska.

PROTEST AND PETITION FOR SUSPENSION

Pursuant to Section 15(7) of the Interstate Commerce Act (hereinafter "the Act"), 49 U.S.C. § 15(7), and Rule 42 of the Rules of Practice of the Interstate Commerce Commission, 15 C.F.R. § 1100.42, the Department of Justice ("Department") respectfully submits this petition for the suspension of the rates as set forth below which were published in the above-referenced tariffs, without prejudice to the filing carriers to file new rates on one day's notice, and for an investigation into the lawfulness of such rates:

(1)	BP Pipelines Incorporated	$6.35
(2)	Sohio Pipe Line Company	$6.16
(3)	Arco Pipe Line Company	$6.04
(4)	Amerada Hess Pipeline Company	$6.44
(5)	Exxon Pipeline Company	$6.27
(6)	Mobil Alaska Pipeline Company	$6.31
(7)	Union Alaska Pipeline Company	$6.09

In support of its petition, the Department respectfully alleges as follows:

I

This protest is directed at the initial tariff rates for the transportation of unrefined liquid hydrocarbons, including gas liquids, from Prudhoe Bay, Alaska, to Valdez Marine Terminal, Alaska, filed by the following carriers: BP Pipelines Incorporated (hereinafter "BP"), effective date June 20, 1977; Sohio Pipe Line Company (hereinafter "Sohio"), effective date June 20, 1977; Mobil Alaska Pipeline Company (hereinafter "Mobil"), effective date June 20, 1977; Arco Pipe Line Company (hereinafter "Arco"), effective date June 30, 1977; Amerada Hess Pipeline Company (hereinafter "Hess"), effective date July 1, 1977; Exxon Pipeline Company (hereinafter "Exxon"), effective date June 30, 1977; and Union Alaska Pipeline Company (hereinafter "Union"), effective June 30, 1977. Each of the foregoing carriers holds an ownership interest in the Trans-Alaska Pipeline System (hereinafter "TAPS").

II

The above described rates are unreasonably high in violation of Section 1(5) of the Act, 49 U.S.C. § 1(5), and are inconsistent with the National Transportation Policy, 49 U.S.C. preceding, § 1 (54 Stat. 899 (1940)), of encouraging

maximum output through the most efficient means of transportation, at reasonable cost.

III

Table I of attached Exhibit 1, incorporated herein, shows that the initial rates filed by BP, Sohio, Mobil, Arco, Hess, Exxon and Union produce excessive returns on the carriers' equity investments in the pipeline. These data are based upon information in the public record and submissions by the companies to the Commission.[1] Because there is no available information as to the average interest rate on debt or the proportions of debt and equity which apply to the investments of each carrier, with the exception of Sohio and Union,[2] equity return calculations were performed for three debt/equity percentage ratios: 80/20, 85/15 and 90/10, based upon actual total debt costs submitted by the carriers.[3] Conceding, for the purpose of this suspension

1. These submissions are contained in the following letters to the Commission: BP—May 27, 1977; Sohio—June 13 and 14, 1977; Arco—June 1, 1977; Hess—May 13 and June 1, 1977; Exxon—June 1, 1977; Mobil—May 27, 1977; and Union—May 27 and June 14, 1977.

2. In its letter to the Commission of June 13, 1977 Sohio stated that its debt/equity percentage ratio is 86/14 and its average interest rate on debt is 9.3%. Union's debt/equity percentage ratio is 89/11 and its average interest rate on debt is 7.5%. These figures are derived from the letters to the Commission of May 27 and June 14, 1977.

3. The data sources relied upon for each element of this calculation and the basis for certain assumptions made (necessitated by gaps in the information supplied by the carriers) are specified in Exhibit 1. Some of the assumptions made are based upon a study prepared under contract to the Federal Energy Administration by Mortada International, "The Determination of Equitable Pricing Levels for North Slope Alaskan Crude Oil" (Nov. 1976) (hereinafter "Mortada"). For instance, the study utilizes a capitalization of 85% debt/15% equity. *Id.* at I-2. Varying capitalizations were employed to demonstrate the effect of differing debt/equity mixes on return to equity and required tariff rates.

proceeding only, the accuracy and validity of the costs and procedures used by the carriers to determine their rates, the filed rates would result in the following returns to carrier equity:

Carrier	Debt/Equity Ratio		
	80/20	85/15	90/10
BP	31.2%	41.6%	62.3%
Sohio		39.4%[4]	
Arco	29.3%	39.0%	58.6%
Hess	31.9%	42.4%	63.7%
Exxon	39.2%	45.6%	68.4%
Mobil	21.07%	41.3%	62.0%
Union			65.2%[5]

IV

If, for the purposes of this suspension proceeding only, each carrier is permitted to earn a rate of return on equity of 14%[6] and the costs as claimed by the carriers are fully

4. Sohio's return to equity was calculated on the basis of an 86/14 debt/equity percentage ratio, derived from information supplied by the carrier. *See* note 1, p. 3, ***supra***.

5. Union's return to equity was calculated on the basis of an 89/11 debt/equity percentage ratio, derived from information supplied by the carrier. *See* note 1, p. 3, ***supra***.

6. The Department does not adopt a 14% return to equity as reasonable, nor does it adopt the costs, supplied by the carriers, relied upon as reasonably incurred. The Department reserves the right to offer further evidence on return to equity and to question any and all costs incurred or claimed in any further proceedings. The 14% return to equity was chosen based upon a recent Federal Power Commission natural gas pipeline case which found a 13.5% return to equity reasonable, and a recent Federal Communications Commission case which found a 12% return to equity reasonable for AT&T. Natural Gas Pipeline Co. of America, F.P.C. Docket No. RP-74-96, Opinion No. 762A (December 6, 1976); In the matter of American Telephone & Telegraph Co., 57 F.C.C. 2d 960, 972 (1976). Recently, in *Petroleum Products, Williams Brothers Pipe Line Co.*, the Commission found reasonable an independent pipeline company's rates, which resulted in a 14% return to equity. Initial Decision, at 21 (June 6, 1974) *aff'd* 353 I.C.C. (Dec. 21, 1976).

allowed, including interest on indebtedness, without questioning their accuracy and validity, the proposed rates should not exceed the following amounts depending upon individual carrier debt/equity ratios:

Carrier	Debt/Equity Ratio		
	80/20	85/15	90/10
BP	$4.83	$4.53	$4.23
Sohio		$4.54[7]	
Arco	$4.59	$4.40	$4.10
Hess	$4.88	$4.58	$4.27
Exxon	$4.49	$4.19	$3.88
Mobil	$4.83	$4.53	$4.22
Union			$3.74[8]

In Exhibit II the calculations used to determine per barrel rates required to produce sufficient total revenue to yield such a 14% return to equity for each filing carrier are set forth. Separate computations were performed for debt/equity ratios of 80/20, 85/15 and 90/10 utilizing actual carrier reported debt costs. Other costs were derived from submissions by the carriers themselves and information in the public record.

V

Based upon the above described calculations, and again conceding, for the purpose of this suspension proceeding

7. The maximum permissible tariff for Sohio was calculated based on a debt/equity percentage ratio of 86/14 and an average cost of debt of 9.3%, derived from information supplied by the carrier. *See* note 1, p. 3, *supra.*

8. The maximum permissible tariff for Union was calculated based on a debt/equity percentage ratio of 89/11 and an average cost of debt of 7.5%, derived from information supplied by the carrier. *See* note 1, p. 3, *supra.*

only, the accuracy and validity of the cost figures supplied by the carriers themselves, the initial rates filed by the carriers contain overcharges in the following range, depending on specific capitalizations:

BP	$1.52-$2.12
Sohio	$1.62[9]
Arco	$1.45-$1.94
Hess	$1.56-$2.17
Exxon	$1.78-$2.39
Mobil	$1.48-$2.09
Union	$2.35[10]

Such overcharges would result in a total overpayment for TAPS crude oil transportation of $700-900 million annually.

VI

Unreasonably high transportation rates restrict output and prevent the realization of cost savings derived from the large economies of scale associated with pipelines. Unreasonably high transportation rates also discourage exploration and development of new fields by reducing the wellhead value of crude, thereby decreasing returns on production. It would be inconsistent with national energy policy to permit rates to go into effect, such as those proposed by the carriers, which would unnecessarily impair the discovery and exploration of new sources of crude oil.

VII

Rate of return regulation should be designed to produce tariffs that hold the allowed return to capital close to a

9. *See* note 7, p. 5, *supra.*

10. *See* note 8, p. 5, *sdpra.*

competitive level, yet are sufficient to attract capital and maintain a satisfactory level of service. These goals were recognized by Congress in adopting the National Transportation Policy, pursuant to which the Commission must, in carrying out its responsibilities under the Act to regulate interstate crude oil pipelines:

> . . . recognize and preserve the inherent advantages of each [mode of transportation]; . . . promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; . . . [and] encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations [or] undue preferences or advantages[11] . . . .

VIII

The rate levels set forth in Paragraph IV above would compensate the carriers for their actual costs of providing pipeline transportation service, including all debt expenses, based on their own estimates of those costs, allow a generous return to their actual equity invested in the line, and promote safe, adequate, economical and efficient transportation of this critical energy source. Indeed, the requested full investigation may ultimately show that even these rate levels would yield excess returns.

IX

As the foregoing analysis demonstrates, the initial rates for the transportation of petroleum through TAPS are greatly in excess of the amount required to generate

11. 49 U.S.C., preceding §1, 54 Stat. 899 (1940).

revenue sufficient to attract capital and maintain a proper level of service.[12] This showing exceeds that required of protestants by the Act and by the Supreme Court in suspension proceedings contesting new or initial rates. Section 15 (7) of the Act (49 U.S.C. § 15(7)) provides that at any hearing the burden of proof is on the carrier to show that the proposed rate is just and reasonable. The Supreme Court has interpreted Section 15(7) to mean that when a proposed rate is challenged before it goes into effect, the carrier must establish that the rate meets statutory standards.[13] As the Supreme Court stated in *Atchison Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*:

> [Congress] specified the allocation of the burden of proof in suspension proceedings as part of the cost to carriers; in return for confining the power to suspend rates to the Commission . . . Congress made the carriers carry a burden that otherwise would not have been theirs.[14]

Thus, the Commission ought to suspend the rates under protest herein, unless the carriers can convincingly show that they do not exceed an amount consistent with the regulatory goal of encouraging maximum output through the most efficient means of transportation at reasonable cost, and that they do not exceed a level necessary to attract capital and maintain a proper level of service.

12. *See* note 6, p. 4, *supra.*

13. Atchison, T. & S.F., Ry. Co. v. United States, 279 U.S. 768 (1929); Baltimore & O. C. T. R. Co. v. United States, 279 F. Supp. 270 (D. Ill.), *aff'd*, 389 U.S. 88 (1967); Chicago E. I. R. Co. v. United States, 107 F. Supp. 118 (D. Ind. 1950), *aff'd*, 344 U.S. 917 (1953).

14. 412 U.S. 800, 814 (1973).

X

The rates under protest herein should be suspended without prejudice to the carriers to file new rates, not exceeding those set forth in Paragraph IV above, after each carrier has informed the Commission of the debt/equity percentage ratio of its interest in TAPS. In light of the substantial public interest in assuring that the energy needs of the nation are met in the most efficient and reasonably priced manner possible, and in recognition of the importance of TAPS in meeting that goal, a thoroughgoing investigation should be undertaken to determine a reasonable level of rates for the transportation of petroleum through TAPS. Such investigation should include the methodology of determining the rate of return, the appropriate rate of return to be allowed, and the reasonableness of the costs incurred or claimed.

XI

Wherefore, the Department of Justice respectfully requests the Commission to suspend the above described rates as published in the referenced tariffs, without prejudice to the carriers' rights to file rates revised in accordance with those set forth in Paragraph IV above, on one day's notice. The Department further requests the Commission to institute an investigation into the lawfulness of such rates, such investigation to include an analysis of

ratemaking methodology, allowed rate of return, and the reasonableness of costs incurred or claimed.

Respectfully submitted,

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June 15, 1977

Protest of U. S. Department of Justice.

Exhibit I

Exhibit I presents projections of after-tax returns on each carrier's equity investment. Because this calculation requires information on the capital structure of each carrier's ownership interest in TAPS, which, with the exception of Sohio and Union, has not been supplied to the Commission, the calculations have been made under three different assumptions. Debt/equity percentage ratios are assumed to be either 80/20, 85/15 or 90/10 except for Sohio and Union which provided enough information to determine their debt/equity percentage ratios to be 86/14 and 89/11, respectively. These debt/equity percentage ratios are all lower than the ratio for all other United States crude oil and petroleum product pipeline companies, which stood at 92.9/7.1 in 1975.[1] To the extent that actual debt/equity percentage ratios exceed those assumed, the actual returns to equity will be greater than those projected in Table I.

1. Statement of David L. Jones, Economist, Bureau of Economics, ICC, in Ex Parte No. 308, Valuation of Common Carrier Pipelines (April 28, 1977), Table 6.

Protest of U. S. Department of Justice.

TABLE I*

	Exxon	BP	Sohio	Arco	Mobil	Hess	Union
1. Requested Tariff	6.27	6.35	6.16	6.04	6.31	6.44	6.09
2. Annual Volume	87.6	69.2	146.0	92.0	21.9	6.6	7.3
3. Revenue	549.3	439.4	899.4	555.7	138.2	42.5	44.5
4. Expenses	286.5	250.8	530.2	320.8	79.0	24.2	22.6
5. "Net" Income	262.8	188.6	369.2	234.9	59.2	18.3	21.9
6. Income Taxes	139.7	199.7	195.7	124.2	31.3	9.7	11.6
7. Income After Taxes	123.1	88.9	173.5	110.7	27.9	8.6	10.3
8. Cost of Pipeline Share	1800	1426	3152	1890	450	135	144
9. Estimated Equity							
90/10	180	142.6		189.0	45.0	13.5	15.8
85/15	270	213.9	440.0	283.5	67.5	20.3	
80/20	360	285.2		378.0	90.0	27.0	
10. Return on Equity							
90/10	68.4	62.3		58.6	62.0	63.7	65.2
85/15	45.6	41.6	39.4	39.0	41.3	42.4	
80/20	39.2	31.2		29.3	31.0	31.9	

* Item 1 is in dollars per barrel. Item 2 is in millions of barrels per year.
Items 3-9 are in millions of dollars. Figures in Item 10 are percentages.

EXPLANATION OF TABLE I

Item 1 lists the tariff level filed by the respective carrier.

Item 2 presents each carrier's share of annual throughput, equal to the ownership share, multiplied by 438 million barrels per year, the estimated annual throughput. The annual throughput was obtained by multiplying the estimated daily throughput of 1.2 million barrels per day, expected to be achieved by fall of 1977, by 365 days.

Item 3 presents projected annual revenue for each carrier under its filed tariff, equal to the tariff level (Item 1) multiplied by projected annual throughput (Item 2).

Item 4 presents each carrier's projected total expenses (including all allowances for depreciation, provision for removal and restoration, miscellaneous non-income pipeline taxes, etc.) as submitted by the carrier to the Commission.

Item 5 presents each carrier's projected annual earnings, equal to total projected revenue (Item 3) minus claimed total expenses (Item 4).

Item 6 presents income taxes payable on total projected earnings (Item 5). This represents a composite rate derived as follows: Alaska taxes equal to 9.4% are deducted first, after which federal taxes of 48% are payable, for a composite rate of 52.89%.[1]

Item 7 presents each carrier's after-tax income, equal to net earnings (Item 5) minus taxes (Item 6).

*Item 8** presents each carrier's share of total pipeline construction costs, currently claimed to be $9 billion.[2]

1. Mortada, at IV-23.
2. *Id.* at IV-19.

*Item 9** presents estimated equity investment for each carrier under each of the three debt/equity percentage assumptions outlined above. Each carrier's share of total construction costs is assumed equal to that carrier's total capital investment.

*Item 10** presents each carrier's projected after-tax return on equity, equal to that carrier's projected after-tax earnings (Item 7) divided by that carrier's equity investment under each capital structure assumption (Item 9).

EXHIBIT II

Table II presents the calculation of maximum permissible tariffs for each carrier under each of the three capital structure assumptions described in Exhibit I. The estimates for Sohio reflect the 86/14 debt/equity percentage ratio calculated from Schedule V of its letter to the Commission of June 13, 1977, discussed in the explanation of Exhibit I, above. The estimates for Union reflect the 89/11 debt/equity percentage ratio calculated from its letters to the Commission of May 27 and June 14, 1977, which are also discussed in Exhibit I, above.

* In a letter dated June 13, 1977 to the Commission, Sohio furnished sufficient additional information to allow calculation of its estimated debt/equity percentage ratio. In schedule V to that letter, Sohio estimates its total capital to be $3151.5 million of which $2707.5 million is debt and $444 million is equity. This produces a debt/equity percentage ratio of 86/14. These estimates were used in place of the assumptions in Items 8, 9 and 10.

In letters dated May 27 and June 14, 1977 to the Commission, Union furnished sufficient additional information to allow calculation of its estimated debt/equity percentage ratio. Union estimates its total capital to be $144.2 million of which $128.4 million is debt, leaving $15.8 million in equity. This produces a debt/equity percentage ratio of 89/11. These estimates were used in place of the assumptions in Items 8, 9 and 10.

TABLE II*

		BP			Sohio	Union
		80/20	85/15	90/10	86/14	89/11
1.	System Share	15.84	15.84	15.84	33.34	1.66
2.	Annual Volume	69.4	69.4	69.4	146.0	7.3
3.	Cost of Pipeline	1425.6	1425.6	1425.6	3151.5	144.2
4.	Debt	1140.5	1211.8	1283.0	2707.5	128.4
5.	Equity	285.1	213.8	142.6	444.0	15.8
6.	Interest	118.9 1/	118.9 1/	118.9 1/	252.5	9.6
7.	Depreciation	60.0 2/	60.0 2/	60.0 2/	126.2	5.8
8.	Removal Costs	7.2	7.2	7.2	14.0	.7
9.	Operating Expenses	38.4	38.4	38.4	82.3	3.8
10.	Pipeline Taxes	26.3	26.3	26.3	55.1	2.7
11.	Total Expenses	250.8	250.8	250.8	530.1	22.6
12.	Return on Equity	39.9	29.9	20.0	62.2	2.2
13.	Imputed Income Taxes	44.8	33.6	22.5	70.1	2.5
14.	Total Revenue Required	335.5	314.3	293.3	662.4	27.3
15.	Maximum Permissible Tariff	4.83	4.53	4.23	4.54	3.74

* Item 1 is a percentage. Item 2 is in millions of barrels per year. Items 3-14 are in millions of dollars. Item 15 is in dollars per barrel.

1/ This item includes some Alyeska Pipeline Service Co. interest which has not been included in Item 9.

2/ This item includes $8 million "BP Pipeline depreciation."

TABLE II (con't)

		Arco			Hess		
		80/20	85/15	90/10	80/20	85/15	90/10
1.	System Share	21.0	21.0	21.0	1.5	1.5	1.5
2.	Annual Volume	92.0	92.0	92.0	6.6	6.6	6.6
3.	Cost of Pipeline	1890.0	1890.0	1890.0	135.0	135.0	135.0
4.	Debt	1512.0	1606.5	1701.0	108.0	114.8	121.5
5.	Equity	378.0	283.5	189.0	27.0	20.2	13.5
6.	Interest	140.2	140.2	140.2	11.3	11.3	11.3
7.	Depreciation	77.2	77.2	77.2	5.8	5.8	5.8
8.	Removal Costs	13.2	13.2	13.2	0.6	0.6	0.6
9.	Operating Expenses	56.0	56.0	56.0	4.0	4.0	4.0
10.	Pipeline Taxes	34.3	34.3	34.3	2.5	2.5	2.5
11.	Total Expenses	320.9	320.9	320.9	24.2	24.2	24.2
12.	Return on Equity	52.9	39.7	26.5	3.8	2.8	1.9
13.	Imputed Income Taxes	59.4	44.6	29.7	4.2	3.1	2.1
14.	Total Revenue Required	433.2	405.2	377.1	32.2	30.1	28.2
15.	Maximum Permissible Tariff	4.69	4.40	4.10	4.88	4.58	4.27

Protest of U. S. Department of Justice.

TABLE II (con't)

	Exxon		Mobil		
	85/15	80/20	85/15	80/20	90/10
1. System Share	20.0	20.0	5.0	5.0	5.0
2. Annual Volume	87.6	87.6	21.9	21.9	21.9
3. Cost of Pipeline	1800.0	1800.0	450.0	450.0	450.0
4. Debt	1530.0	1440.0	382.5	360.0	405.0
5. Equity	270.0	360.0	67.5	90.0	45.0
6. Interest	114.5	114.5	32.8	32.8	32.8
7. Depreciation	73.7	73.7	18.1	18.1	18.1
8. Removal Costs	16.4	16.4	8.5	8.5	8.5
9. Operating Expenses	49.5	49.5	11.4	11.4	11.4
10. Pipeline Taxes	32.4	32.4	8.3	8.3	3
11. Total Expenses	286.5	286.5	79.1	79.1	79.1
12. Return on Equity	37.8	50.4	9.5	12.6	6.3
13. Imputed Income Taxes	42.4	56.6	10.7	14.1	7.1
14. Total Revenue Required	366.7	393.5	99.3	105.8	92.5
15. Maximum Permissible Tariff	4.19	4.49	4.53	4.83	4.22

Protest of U. S. Department of Justice.

EXPLANATION OF TABLE II

Item 1 presents each carrier's percentage ownership in the system.

Item 2 presents each carrier's share of total projected annual throughput (See Item 2, Table I).

*Item 3** presents each carrier's share of total claimed system construction costs. This item assumes a cost of $9 billion based on the Mortada study. An increase in allowed total pipeline cost would increase the estimated tariffs in the following manner. Using the same methods used throughout this table, the estimated per barrel tariff would increase by 1.0 cent for each $100 million increase in the cost of the pipeline, assuming an 85/15 debt/equity ratio. The increase in the estimated tariff would be 1.4 cents per barrel for each additional $100 million in pipeline cost at a debt/equity capitalization of 80/20 and would be .7 cents at a debt/equity capitalization of 90/10. (See Item 8, Table I).

*Item 4** presents each carrier's debt burden under each capital structure assumption (See Item 9, Table I).

Item 5 presents each carrier's equity share, equal to its total cost share (Item 3) minus its debt burden (Item 4).

Item 6 presents each carrier's interest payments, as claimed in filings made to the Commission (Account 650).

Item 7 presents each carrier's share of annual depreciation, as presented in filings made to the Commission (Account 540).

Item 8 presents each carrier's annual contribution to funds for removal and restoration, as presented in filings made to the Commission (Account 660).

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* As discussed in the Explanation of Table I, Sohio and Union have furnished additional data concerning their estimated debt and equity. Those figures are used in Items 3 and 4.

Protest of U. S. Department of Justice.

Item 9 presents each carrier's total annual operating expenses, as presented in filings made to the Commission, less depreciation (Account 540), pipeline taxes (Account 580), interest (Account 650), and provision for removal and restoration (Account 660), which are taken into account in Items 7, 10, 6, and 8, respectively. (Alyeska interest included in Account 650 has been *included* in this item.[1])

Item 10 presents each carrier's share of pipeline taxes, as presented in filings to the Commission (Account 580).

Item 11 presents total expenses for each carrier, equal to the sum of:

Item 6: Interest
Item 7: Depreciation
Item 8: Provision for removal and restoration
Item 10: Pipeline taxes

Item 12 presents, for each carrier, the amount of after-tax earnings required to yield that carrier an after-tax rate of return on equity of 14%.[2]

Item 13 presents total income taxes which would have to be paid to yield the after-tax earnings shown in Item 12. Since the composite tax rate is 52.89%, (see Item 6, Table I), Item 13 equals (Item 12) × 100/47.11 — (Item 12) = (Item 12) × 1.123.

Item 14 presents total annual revenue requirements for each owner, equal to the sum of:

Item 11: Total expenses
Item 12: Return on equity
Item 13: Imputed income taxes

1. BP share of Alyeska interest has been included in Item 3 and not in Item 9.
2. See p. 4, *supra*.

Protest of U. S. Department of Justice.

Item 15 presents fully allocated cost per barrel for each carrier, which also equals the average tariff required to yield each owner a 14% after-tax return on equity under each capital structure assumption.

[Certificate of Service omitted in printing]

Protest of Arctic Slope Regional Corporation For Suspension of Initial Rates and Rules for Transportation of Petroleum Via the Trans Alaska Pipeline System, June 15, 1977.

[Caption omitted in printing]

PETITION AND COMPLAINT BY ARCTIC SLOPE REGIONAL CORPORATION FOR SUSPENSION OF INITIAL RATES AND RULES FOR TRANSPORTATION OF PETROLEUM VIA THE TRANS ALASKA PIPELINE SYSTEM (TAPS) FROM PRUDHOE BAY, ALASKA, TO VALDEZ, ALASKA, AND FOR AN INVESTIGATION THEREOF

The Arctic Slope Regional Corporation (ASRC), an Alaska business for profit corporation created pursuant to the Alaska Native Claims Settlement Act, 85 Stat. 688, 43 U.S.C. 1601 *et seq.*, on behalf of ASRC and its 4,000 Inupiat Eskimo shareholders, files this petition in which ASRC seeks:

A. Suspension of the rates and rules published by:

1. Sohio Pipe Line Company, ICC No. 742, issued June 3, 1977, effective June 20, 1977,* ($6.16);

2. BP Pipelines Inc., ICC Nos. 1 and 2, issued May 31, 1977, effective June 20, 1977,* ($6.35);

3. Mobil Alaska Pipeline Co., ICC Nos. 1 and 2, issued June 10, 1977, effective June 20, 1977,* ($6.31);

4. Amerada Hess Pipeline Corporation, ICC Nos. 1 and 2, issued June 1, 1977, effective July 1, 1977, ($6.44);

5. ARCO Pipe Line Company, ICC No. 1030, issued May 31, 1977, effective June 30, 1977, ($6.04);

Protest of Arctic Slope Regional Corporation.

6. Exxon Pipeline Company, ICC Nos. 124 and 125, issued June 8, 1977, effective June 20 and 30, 1977, respectively, ($6.27);

all of which are for the transportation of petroleum via Trans Alaska Pipeline System (TAPS) from Prudhoe Bay, Alaska, to Valdez, Alaska; and

B. The institution of an immediate investigation of the justification for and lawfulness of such rates and rules.

I.

SUMMARY STATEMENT

Eight pipeline companies, six of which have issued tariffs only days before they are to become effective,[1] are owned by vertically integrated corporations that control production of crude oil at Prudhoe Bay, on Alaska's Arctic Slope, shipment of that oil through TAPS and from Valdez to points of entry in the lower 48 states, and distribution within the United States. The proposed tariffs at rates between $6.04 and $6.44 per barrel, would drastically reduce the well-head price upon which royalties payable to the State of Alaska and approximately 100,000 Alaska Natives are determined. This would, in effect, postpone payment and thereby reduce the value of $500 million that Congress has determined to be owing to the Natives. In addition, the reduced well-head price would establish an entry barrier that would eliminate any incentive for other production companies to make the investment necessary to exploit other reserves not now being developed by the eight cor-

* Rates tariffs effective dates postponed to June 30, 1977, by Supplemental Notice of the Interstate Commerce Commission served June 13, 1977.

1. Two companies, Phillips Petroleum Co. and Union Alaska Pipeline, have not yet issued their initial tariffs.

porations. Such a barrier would effectively negate the value of several million acres of Arctic Slope lands that Congress granted to Arctic Slope Eskimos in exchange for the Prudhoe Bay oil reserves now held by the eight oil companies that own the pipeline companies.

In order to justify these extraordinarily high tariffs to reduce well-head price, the carriers include, among others, the following erroneous factors and methods in their computations: (1) an unreasonably high capital basis; (2) an excessive rate of return on equity; (3) an incorrect deduction of interest; (4) improper methods of valuation; (5) improper assumptions about throughput; (6) a service life of 25 rather than 35 years; and (7) failure to account for the availability of capital guaranteed by deferral of expenses. Any of these errors and also the proposed discriminatory and unreasonable rules, and the anticompetitive effect of the tariffs are *prima facie* evidence that the tariffs are unjust and unreasonable and require suspension and investigation in the public interest.

II.

BACKGROUND

Prior to the enactment of the Alaska Native Claims Settlement Act ("ANCSA") on December 18, 1971, the Inupiat Eskimos had claims of unextinguished aboriginal title based on use and occupancy since time immemorial to the entire Arctic Slope of the State of Alaska. Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land*, 459, Figure V-19 (1968) [hereinafter cited as Fed. Field Comm.] (North Slope Native Association Protest to Land Selections by State of Alaska, Protest #F-035257); 43 U.S.C. §1601(a). Other Native people of

Alaska (Eskimos, Aleuts, and Indians) had similar and substantial claims to other areas of the State. Fed. Field Comm., ch. 5. The Supreme Court has repeatedly declared that such claims are protected by federal law and can be extinguished only by Act of Congress. *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974); *United States* v. *Santa Fe Pac. R.R.,* 314 U.S. 339 (1941). From the acquisition of Alaska in 1867 until 1971, Native rights of use and occupancy were preserved and protected by Congressional acts [Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26; Act of March 3, 1891, ch. 561, § 14, 26 Stat. 1096, 1100; Act of June 6, 1900, ch. 786, § 27, 31 Stat. 321, 330; Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339 (Alaska Statehood Act)], and regulations of the Department of the Interior. (*E.g.,* 43 C.F.R. § 2091, 6-3)

In the mid-1960's, acting under color of Section 6 of the Alaska Statehood Act, *supra,* which granted the State over 104 million acres of federal land, Alaska began to select land on the Arctic Slope and elsewhere in the State. These selections included substantial areas at what is now known as Prudhoe Bay. Fed. Field Comm., ch. 5.

By all means available to them, Arctic Slope Eskimos and other Alaska Natives vigorously protested these selections. Fed. Field Comm., Figure V-19. In response to their protests and the United States' fiduciary duty to Native Americans, the Secretary of the Interior imposed a "land freeze" in 1966, halting all transfers of public lands in Alaska pending resolution of Native claims. P.L.O. No. 4582, 34 Fed. Reg. 1025 (1969); S. Rep. No. 92-405, 92d Cong., 1st Sess. 97 (1971) (discussing Native protests and resulting informal freeze orders). The land freeze, which was judicially upheld in *State of Alaska* v. *Udall,* 420 F. 2d 938 (9th Cir., 1969), greatly increased pressure on Con-

gress to resolve the competing claims of Alaska Natives and the State of Alaska.

In 1968 oil was discovered at Prudhoe Bay on the Arctic Slope. Subsequently, on December 18, 1971, Section 4 of ANCSA extinguished all aboriginal land claims in Alaska, including the Arctic Slope Eskimos' claim to Prudhoe Bay. 43 U.S.C. § 1603. ANCSA also transferred to the State of Alaska substantial portions of Prudhoe Bay that had been selected by the State under color of the Statehood Act. 43 U.S.C. §1613(g).

As compensation for that extinguishment, ANCSA granted Alaska Natives fee title to approximately 40 million acres of land. 43 U.S.C. §§1611, 1613. All future revenues derived from that land will be the property of the Alaska Native people. 43 U.S.C. §1606.

Additionally, ANCSA provided for a cash settlement of $962,500,000 to be paid over a period of years. $462,500,000 will be paid by the United States from appropriated funds. 43 U.S.C. §1605. The remainder will be paid from revenues derived from a 2% royalty on the well-head value of all crude oil production in Alaska under state or federal leases. 43 U.S.C. §§1605, 1608.

Prior to the passage of ANCSA, eight oil companies that had state leases on the 10 billion barrel reserves at Prudhoe Bay joined together to form a consortium for the construction and operation of the Trans Alaska Pipeline System ("TAPS"). Subsequent to ANCSA, those companies formed Alyeska Pipeline Service Company. After numerous delays and significant litigation, Congress acted to authorize directly construction of TAPS and to assure full federal cooperation. Trans-Alaska Oil Pipeline Authorization Act of November 16, 1974, 67 Stat. 557, 43 U.S.C. §§ 1651-55. One of the reasons advanced by the pipeline companies for passage of that Act was that early completion of the pipeline would benefit Alaska Natives.

III.

STANDING

ASRC and the twelve other regional corporations have specific responsibilities in the administration of ANCSA's land claims settlement. These responsibilities include investment and distribution of settlement funds, selection of lands granted under the Act, management of those lands, and provision of assistance to village corporations. *See generally* 43 U.S.C. § 1606.

ASRC, for the benefit of its nearly 4,000 Inupiat Eskimo shareholders, was granted selection rights to approximately 5 million acres of surface and subsurface lands on the Arctic Slope of Alaska. Since 1972 ASRC has selected its entitlement and has received interim conveyances to approximately 4.5 million acres from the United States. A large portion of the lands selected by or conveyed to ASRC are immediately accessible to TAPS. If, as is likely, oil reserves suitable for commercial development are found on these lands, crude oil will be tendered for shipment on TAPS by ASRC or its lessees.

On at least four distinct grounds, ASRC has legal and equitable standing in these proceedings to petition the Commission and to protest the initial rates published by the Sohio Pipe Line Company, BP Pipelines, Inc., Mobil, Alaska, Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, and Exxon Pipeline Company:

1. ASRC's status as the owner or prospective owner of 5 million acres of potential oil and gas producing lands on Alaska's North Slope. In this capacity, ASRC is a land owner the value of whose oil and gas properties is directly increased or decreased by the amount of the TAPS tariff.

2. ASRC's status as a prospective shipper of crude oil through TAPS.

3. ASRC's status as the recipient of the Inupiat Eskimos' share of the 2 percent royalty on all crude oil production in Alaska under State or Federal leases. The higher the well-head value of oil produced under such leases, the sooner the Alaska Native Fund will receive and distribute the $500 million granted by ANCSA. Any delay in the receipt of royalty payments substantially reduces the value of those payments to all Alaska Natives.

4. ASRC's status as the beneficiary of a proportionate share of seventy percent of all revenues from crude oil production on the lands owned by the other 11 regional Native Corporations.

In each of these instances, ASRC's revenues will be diminished to the extent that crude oil owned by ASRC, or crude oil owned by others to which ASRC has a revenue entitlement, is shipped through TAPS at the proposed rates. For a summary of the effect of TAPS' tariffs on the well-head price of Arctic Slope Crude Oil and the payout period for the Alaska Native Fund, see Exhibit A attached hereto.

IV.

STATEMENT OF REASONS

A. The Factual Basis and Method Used by the Carriers to compute the Proposed Tariff are Inaccurate and Improper.

By letter dated June 13, 1977, the Sohio Pipe Line Company responded to the Commission's "Request For Prompt

Filing of Data Concerning Proposed Rate Levels". The information provided in this letter and the estimated cost data supplied by Sohio under separate letter dated June 14, 1977, to the Section of Audit, demonstrate that an inaccurate factual basis and improper method were used by the TAPS carriers in determining the proposed tariffs.

The following general discussion of factual basis and method used to determined the tariffs draws primarily upon this Sohio data. Sohio Pipe Line Company has a 33⅓ percent interest in TAPS. The conclusions which are drawn based upon the Sohio data will vary, of course, in some minor respects from other carriers depending upon their respective costs of operation and capital costs.

(i) *The rate tariffs are based upon an unreasonably high capital base.*

The Sohio data indicates that total capital expenditures by all TAPS carriers as of September 1, 1977, including capitalized taxes and overhead, and capitalized interest for the TAPS is $9.271 billion (Sohio letter dated June 13, 1977, Schedule V; Total 3090.4 multiplied by a factor of 3). This projected total capital cost is substantially in excess of the $900 million estimate first advanced by TAPS proponents in 1969. Speech by E. L. Patton, Chairman, Alyeska Pipeline Service Company, to Town Hall of California (May 17, 1977). This increase, in part, is the result of more than eight years' inflation and the cost of providing for environmental safeguards; however, Touche Ross and the General Accounting Office, among others, currently are investigating the extent to which a portion of this increase may be attributable to mismanagement and waste. If such mismanagement and waste is substantiated, these costs should not be passed on to the TAPS shippers and ultimately to

the American consumer. Also, to the extent the interest rates on the TAPS debt exceed a reasonable amount and are not comparable to rates paid by affiliates of the TAPS carriers, the excess should not be passed on to the TAPS shippers and the consumer. If a reduction in the capital cost is made for these items, the adjusted figures would have a dramatic impact resulting in the calculation of a more reasonable rate tariff. Until these studies are complete, the proposed rate tariffs should be suspended.

(ii) *The proposed rate tariffs would yield an unreasonably high rate of return on equity.*

Assuming that all of its other calculations are correct, the Sohio data suggests that Sohio equity during 1978 and 1979 will total no more than $569.3 million (*Id.*, Schedule V) and net income after imputed taxes will total approximately $176 million and increase substantially thereafter. (Id., Schedule I) Using these figures, the rate of return on equity will be approximately 31 percent and the actual rate of return is substantially greater because, *inter alia*, net income is computed after imputed but unpaid taxes and after deduction of an improper depreciation allowance and amortization of expenses. The TAPS operation, constituting a monopoly, will be virtually free of risk and will continue without competition for many years; and a rate of return on equity which is more closely in line with that found in unregulated industries is required.

(iii) *The justifications for the proposed rate tariffs improperly deduct interest expense in calculating the rate of return on the valuation of the TAPS system.*

Assuming, as Sohio has determined, that the rate tariff should be based on a seven percent[2] rate of return on valua-

2. The Sohio justification (Id., Schedule I) inaccurately cites a 1941 Elkins Act Consent Decree as authority for the use of a seven percent rate of return in the amount of valuation of a pipeline. However, this decree was not concerned with what constitutes a reasonable rate of return but rather with the amount of dividends that may be paid by a controlled pipeline company to its parent without constituting an illegal rebate.

tion rather than on equity, which ASRC denies, Sohio's computation actually results in a rate of return in excess of seven percent because interest on debt is deducted as an expense item before computation of the rate of return at the same time that borrowed capital is included in the capital base. Deduction of interest, which averages 9.3 percent (Id., Schedule III) and is paid upon borrowed funds, and inclusion of borrowed funds in the base upon which the seven percent is calculated will give the carriers a classic "double dip" at the expense of shippers and the American public, and plainly results in excessive and unreasonable rate tariffs.

(iv) *The proposed tariffs are based upon an improper method of valuation.*

Since the Commission first was given jurisdiction over pipeline rates with the passage of the Hepburn Act in 1906, it has had occasion to consider in depth the reasonableness of pipeline rates in four major cases. *Reduced Pipe Line Rates and Gathering Charges,* 342 I.C.C. 115 (1940); *Petroleum Rail Shippers' Assn.* v. *Alton & S.R.,* 243 I.C.C. 589 (1941); *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.,* 358 I.C.C. 41 (1944); and *Petroleum Products Williams Bros. Pipe Line Company,* 351 I.C.C. 102 (1975), aff'd on reconsideration, I.C.C. (Docket 3553, served December 21, 1976). In these cases the Commission has permitted allowance for reproduction costs in the valuation formula.

The use of reproduction costs for valuation is virtually unique to the Commission and results in pipeline companies realizing rates of return which significantly exceed rates permitted other public utilities. Also, this use results in a

double charge to the shipper for the cost of inflation because inflation is reflected also in operating expenses and in allowances for return on equity and on borrowed funds.

In Sohio's letter to the Commission dated June 13, 1977, Schedule V, reproduction costs are reflected by the use of a factor of 1.06 in determining "Going Concern" Value. This value is increased by this same factor each year.

Use of reproduction costs has been challenged by the Justice Department, among others, as creating an excessive rate of return for pipeline companies. Presently, this issue is under review by the Commission in Ex Parte 308 (Sub-No. 1), *Investigation of Common Carrier Pipelines.*

Based upon the foregoing discussion, allowance for reproduction costs in general, and the use of an annual factor of 1.06 to determine "Going Concern" Value, in specific, should not be permitted until conclusion of the Commission's pending review of valuation in Ex Parte 308, *supra.*

(v) *The carrier justifications incorrectly assume throughout of 1.2 million barrels per day, increasing to 1.55 million in 1980.*

The Sohio projection of throughput (June 13, 1977 letter of Sohio, Schedule II), which corresponds with that of Amerada Hess, varies dramatically from earlier projections of 2 MMbpd (million barrels per day). See, Note, 81 Yale L. J. 1592, 1627 n. 156. Since operating income will increase dramatically if projected throughput is understated, the Commission should investigate the lower projection and require the carriers to more fully justify their projection.

(vi) *The rate tariffs are improperly based upon a 25-year amortization of Dismantling and Restoration Expenses, Depreciation is improperly based upon a term of 25 years, rather than a more reasonable term of 35 years.*

The carriers have estimated the TAPS useful life to be 25 years. (Sohio letter to the Commission dated June 13, 1977, Schedules IV and VI). But, the useful life of other pipelines owned by TAPS carriers range between 31 and 42 years and previous estimates establish TAPS' useful life at 35 years. If TAPS' useful life were 35 years, yearly amortization would be $30 million instead of $42 million, assuming total dismantling costs of $1.05 billion, and annual depreciation would be $222.86 million instead of $312 million (assuming net property of $7.8 billion).

The Commission should investigate TAPS' useful life and require the carriers to justify their calculation. In its June 13, 1977 letter, Sohio states that the 25-year useful life is based on the estimated life of the oil fields served by TAPS. However, such estimates ignore the useful lives of adjacent and parallel fields which will also be served by TAPS.

(vii) *The tariffs fail to consider the substantial amount of capital generated by non-cash deductions.*

Substantial cash flow is made available to the carriers from depreciation, deferred taxes, and amortized dismantling costs. This cash flow to the carriers is a direct result of payments of rates by shippers and offsets requirements for working capital. These items should be included to reduce cost of operation of TAPS, which will result in increased net income.

(viii) *Failure to properly justify and calculate the rate tariffs requires that they be suspended.*

As demonstrated above, in the preceding paragraphs, *prima facie* the justification for the extraordinary tariffs proposed by the TAPS carriers are unjust and unreasonable. The burden of justifying new, assailed rates as just and reasonable rests upon the proponent-carrier, *Baltimore & Ohio Chicago Terminal R. R.* v. *United States,* 279 F. Supp. 270, 274 (N.D. Ill.), aff'd, 389 U.S. 88 (1967), and the basis for calculation of the tariffs, as disclosed to date by the TAPS carriers, indicates that the burden cannot be met.

B. THE ANTICOMPETITIVE EFFECT OF THE JOINT VENTURE TAPS OPERATION, AS MANIFESTED IN THE PROPOSED TARIFFS, REQUIRES INVESTIGATION BY THE COMMISSION OF POSSIBLE VIOLATIONS OF THE CLAYTON ACT.

In Ex Parte No. 308 (Sub. No. 1), *Investigation of Common Carrier Pipelines,* the Commission is studying whether shipper ownership of petroleum pipelines has undesirable anticompetitive effects, and this issue is one which has concerned the Congress. See, House Report No. 92-617, "Anticompetitive Impact of Oil Company Ownership of Petroleum Products Pipelines" (October 18, 1972).

A significant anticompetitive effect may result if the proposed tariffs are not suspended. Under pending FEA proposed rule making, it appears that the West Coast price per barrel of oil will be approximately $11.50. Based on the proposed rate tariffs of approximately $6.25 and the shipment costs from Valdez of $1.00, the well-head price will be $4.25. This well-head price is so low that it would reduce significantly the number of oil companies not members of the TAPS consortium that will bid on the development of new oil fields on the Arctic Slope and it also will dramatically

reduce their bids. By comparison, members of the pipeline consortium would find it more feasible to bid on such new fields because their high rate of return on investment from TAPS offsets any reduced profit from production. The TAPS carriers' unlawful purpose in setting high tariffs thereby is apparent.

As the owner of approximately five million acres of Arctic Slope lands which may contain significant oil reserves, ASRC has a major stake in preserving competition. This interest is shared with other native regional corporations which own lands with potential reserves and which are entitled under §7(i) of ANCSA to 70% of mineral revenue from any one region. As a result of this anticompetitive effect, the Alaska Natives $500 million fund created under the ANCSA would be reduced substantially in value and the possibility of exploitation of other oil reserves at a reasonable well-head price will be diminished at the expense of the Natives and consumers.

V.

AN ACCEPTABLE INITIAL RATE

ASRC, consistent with the position it has taken in this petition on the need for a suspension and the establishment of appropriate standards on which the carriers' tariffs can be lawfully based, would not object to tariffs being filed on one day's notice by Sohio Pipe Line Company not exceeding $3.16, by BP Pipelines, Inc., not exceeding $3.04, by Mobil, Alaska, not exceeding $3.31, by Amerada Hess Pipeline Corporation, not exceeding $3.44, by ARCO Pipeline Company not exceeding $3.35 and by Exxon Pipeline Company not exceeding $3.27.

ASRC's position on an acceptable initial rate is, of course, conditioned upon establishment of a procedure for

appropriate adjustment of such rates following the Commission's final determination of a justifiable and lawful rate. An appropriate annual interest rate on any refunds would be the higher of either: (1) a rate two points above the mean prime rate during the period in which the carriers had the benefit of any excess charges, or (2) the equivalent of the mean internal rate of return achieved by the carriers during the same period on retained earnings committed to their own operations. Presumably, in their own affairs, the carriers would always invest their own funds in the higher of the two alternatives. Any lesser rate would constitute de facto forced lending by Alaska Natives to the carriers at an interest rate below commercial market rates.

ASRC acknowledges that in suspension proceedings in which carriers and producers have independent interests, it may be appropriate for the Commission to favor a carrier with the benefit of any doubts. However, for many independent reasons that presumption should not be applied where the carriers and producers have substantially unitary interests.

The principal reason to favor the carrier in an ordinary suspension proceeding is the carrier's inability, retroactively, to recover upward adjustments from the shipper. However, in these proceedings, if the final tariff were to be adjudicated at a higher rate than the initial tariff, most of any profits lost by the companies from their pipeline operations would be recouped by their production operations. Conversely, those companies can recoup from pipeline profits any loss of well-head crude values that are caused by excessive TAPS tariffs.

Futhermore, the companies have strong incentives to maximize profits from their pipeline rather than from their crude oil production. One incentive is to avoid royalty pay-

ments to the State of 12.5% from which the Native corporations derive their 2% royalty. Another is to avoid the State's 12.25% severance tax. Each of these items, as previously discussed, is based upon well-head value of crude oil which in turn is inversely related to the TAPS tariffs.

In addition to the considerations outlined above, an initial tariff that exceeds the $3.00 to $3.50 range combined with a refund interest rate less than that described above would also be adverse to sound public policy. Any such combination would:

(1) be a substantial incentive for the TAPS companies to delay, for as long as possible, production of necessary information and a final adjudication of proper tariffs;

(2) negate congressional interest that Alaska Natives be compensated promptly for the extinguishment of their aboriginal lands claims;

(3) substantially reduce the value of compensation provided ASRC and other Alaska Natives by ANCSA;

(4) perpetuate an insurmountable entry barrier to development of additional Alaska oil reserves by companies other than those controlling TAPS; and

(5) result in windfall gains to the TAPS companies.

Extraordinary procedural considerations also require the lowest possible initial tariff. For example, assuming that after a long and complicated proceeding, the Commission were to conclude that ARCO Pipe Line Company had overcharged Atlantic Richfield Company by $3.00 per barrel. Atlantic Richfield, the "producer," might refuse to

apply for refunds because, after such intra-corporate transfers, the refunds would be subject to Alaska's royalty and severance taxes. The State of Alaska, Atlantic Richfield's lessor, might have no way to force its lessee to apply for refunds with the result that refunds resulting from the excessive interim tariffs *may never be paid.*

Refunds will raise several other serious questions. How would those claims be computed? Would they include a prorata share of the refund interest? Could the State and producer companies offset other claims against each other? Could the State and pipeline companies offset other claims against each other?

More importantly to ASRC, will the Commission ensure that ASRC and other Native corporations get their prorata shares of any such refunds? In short, (i) because of the vertical integration and interrelationships of all the producing and pipeline companies in these proceedings, (ii) because of the attenuated ability of first the State and then ASRC to obtain their respective shares of any refunds, and (iii) because of the absence of substantial harm to the producing and pipeline companies from a low initial tariff, and (iv) to avoid encouraging dilatory and delaying tactics by the pipeline companies the Commission should not approve an initial tariff that exceeds in any respect the Commission's initial view of what the ultimate tariff ought to be. The benefit of any doubt should go to the Native corporations and to the State of Alaska.

Therefore, because important public issues are involved and because substantial interests of the State of Alaska, ASRC and other Native corporations are at stake, ASRC respectfully urges the Commission to suspend the proposed rules and tariffs and to enter into an immediate investigation of the lawfulness thereof.

ARCTIC SLOPE REGIONAL CORPORATION

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Due Date: June 20, 1977

Date Filed: June 15, 1977

[Certificate of Service omitted in printing]

Protest of Arctic Slope Regional Corporation.

LETTERHEAD OF
ELMER FOX, WESTHEIMER & CO.

June 15, 1977

Mr. Lawrence Dinneen
Executive Vice President
Arctic Slope Regional Corporation
P.O. Box 566
Barrow, Alaska 99723

Attention: Mr. O. Yale Lewis, Jr.
Wickwire, Lewis, Goldmark, Dystel & Schorr

Dear Mr. Dinneen:

We have completed our engagement to project the present value of the royalties on crude oil to be paid into the Alaska Native Fund at varying wellhead prices under Section 9 of the Alaska Native Claims Settlement Act. The assumptions used in preparing the projection were supplied by management of the Arctic Slope Regional Corporation and the scope of our engagement did not include an evaluation of their reasonableness.

The significant assumptions are summarized below.

- *Barrels per year*—Production will be 1.2 million barrels per day or 438 million barrels per year.
- *Price per barrel*—A per barrel crude oil price of $11.50 was used.
- *Transportation Costs*—Transportation costs from Valdez, Alaska to the west coast of the United States will not exceed $1 per barrel. This sum has been subtracted from the base used in determining the price per barrel at the wellhead.

Protest of Arctic Slope Regional Corporation.

- *Limit on the Royalty Fund*—The Alaska Native Fund is limited by law to a total of $500 million. The royalty was calculated at two (2) per cent of the wellhead price.
- *Interest Rate*—An interest rate of eight (8) percent per annum, compounded annually, was used in calculating present value and payments were assumed to be made to the fund at the end of the year in which they accrued.

Based on the accompanying schedule, we believe the royalties to be paid into the Alaskan Native Fund have a greater present value to the Fund's recipients if paid over a shorter rather than a longer time period. The schedule indicates that as the wellhead price per barrel is increased, the period of royalty payments until the $500 million limit is reached is decreased. A visual presentation of the schedule is shown on the two accompanying graphs.

The projection is based on assumptions concerning future events and circumstances. The assumptions disclosed herein are those which are significant to the projection or are key factors upon which management believes the results will depend. Some assumptions inevitably will not materialize and unanticipated events and circumstances may occur subsequent to the date of this projection. Accordingly, the actual results achieved during the projection period will vary from the projection and the variations may be material.

The terms of our engagement are such that we have no obligation to update this report or to revise the projection because of events or circumstances occurring subsequent to the date of this report.

Very truly yours,

ELMER FOX, WESTHEIMER & CO.

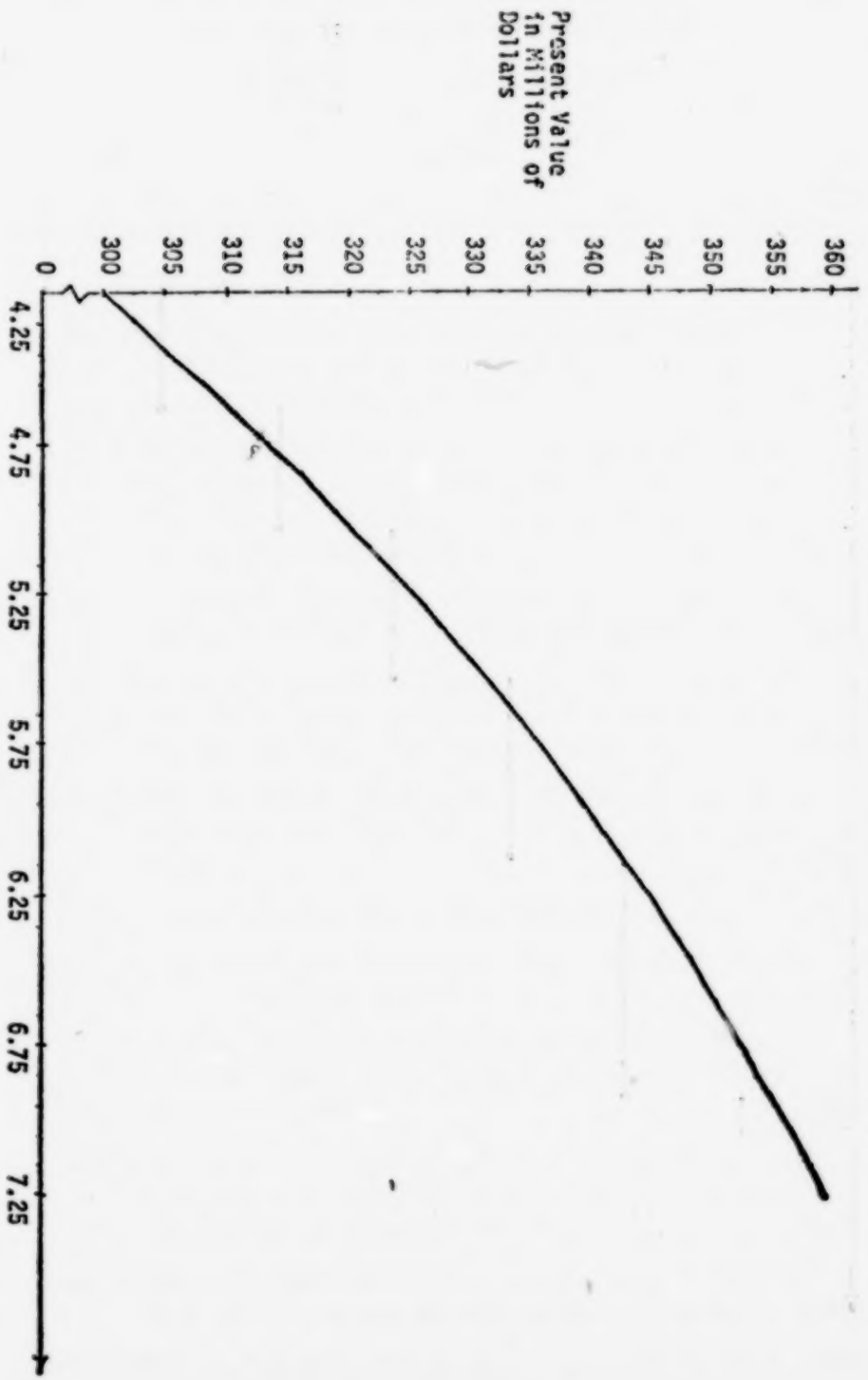
Protest of Arctic Slope Regional Corporation.

PRESENT VALUE OF ROYALTY PAYMENTS
TO THE ALASKAN NATIVE FUND
FOR CRUDE OIL AT VARYING WELLHEAD PRICES

Wellhead price per barrel	Tariff per barrel	Estimated annual royalty payments (000 omitted) 1/	Years until achieving $500 million limit	Present value of royalty payments at 8% (000 omitted)
$4.25	$6.25	$37,230	14	$300,049
4.35	6.15	38,106	14	302,755
4.45	6.05	38,892	13	305,618
4.55	5.95	39,858	13	308,354
4.65	5.85	40,734	13	311,090
4.75	5.75	41,610	13	313,826
4.85	5.65	42,486	12	316,273
4.95	5.55	43,362	12	318,701
5.05	5.45	44,238	12	321,127
5.15	5.35	45,114	12	323,555
5.25	5.25	45,990	11	325,795
5.35	5.15	46,866	11	327,916
5.45	5.05	47,742	11	330,037
5.55	4.95	48,618	11	332,158
5.65	4.85	49,494	11	334,279
5.75	4.75	50,370	10	336,273
5.85	4.65	51,246	10	338,093
5.95	4.55	52,122	10	339,914
6.05	4.45	52,998	10	341,734
6.15	4.35	53,874	10	343,555
6.25	4.25	54,750	10	345,376
6.35	4.15	55,626	9	347,173
6.45	4.05	56,502	9	348,701
6.55	3.95	57,378	9	350,229
6.65	3.85	58,254	9	351,757
6.75	3.75	59,130	9	353,286
6.85	3.65	60,006	9	354,814
6.95	3.55	60,882	9	356,342
7.05	3.45	61,758	9	357,870
7.15	3.35	62,634	8	359,356
7.25	3.25	63,510	8	360,604

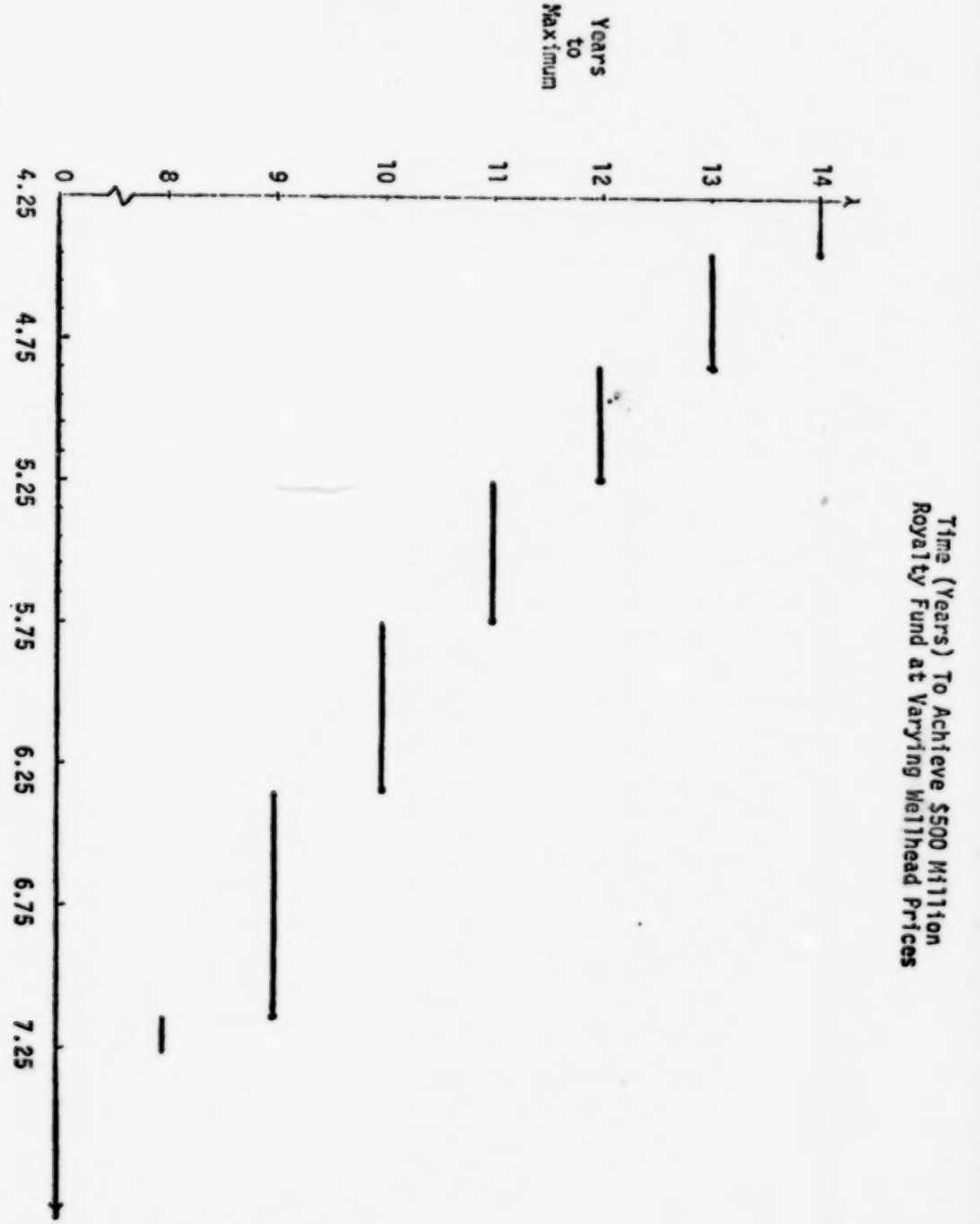
1/ In each case, the last year includes only a partial payment.

Protest of Arctic Slope Regional Corporation



Present Value of 2% Royalty at Varying Wellhead Prices

Protest of Arctic Slope Regional Corporation



Protest of the Interstate Commerce Commission's Bureau of Investigations and Enforcement for Suspension and Investigation, June 15, 1977.

[Caption omitted in printing]

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Before the

INTERSTATE COMMERCE COMMISSION

Protest And Petition For Suspension And Investigation

Effective Dates:	June 20, 1977	June 20, 1977	June 20, 1977
Tariff References:	BP Pipelines, Inc. ICC Nos. 1&2	Mobil Alaska Pipeline Co., ICC Nos. 1&2	Sohio Pipeline Co. ICC No. 742
Rates per Barrel:	635¢	631¢	616¢
Nature of Proposals:	Initial tariffs on petroleum moving from Prudhoe Bay, Alaska, to Valdez, Alaska.		
Effective Dates:	June 30, 1977	June 30, 1977	July 1, 1977
Tariff References:	Arco Pipe Line Co. ICC No. 1030	Exxon Pipeline Co. ICC Nos. 124 & 125	Amerada Hess Pipeline Corp., ICC Nos. 1&2
Rates per Barrel:	604¢	627¢	644¢
Nature of Proposals:	Initial tariffs on petroleum moving from Prudhoe Bay, Alaska, to Valdez, Alaska.		

The Bureau of Investigations and Enforcement of this Commission protests the foregoing initial tariffs, and requests the Commission to enter its order investigating the subject tariffs and suspending the effectiveness of the said tariffs during the pendency of its investigation. The Bureau further requests that the Commission permit the refiling of the said tariffs on a lower basis on one day's notice as described herein and that its order of investigation encompass any such refiled rates or rules. A refund clause and conditions ensuring the production of documents to Touche Ross & Co. should be included in the I. & S. order.

1. Background

The subject tariffs set forth the initial rates and rules of six of the eight pipeline companies owning undivided

interests in the Trans-Alaska Pipeline System (TAPS), a 48-inch line extending from the Prudhoe Bay oil field to the newly constructed Valdez Terminal in Valdez, Alaska. The main Prudhoe Bay field was discovered in 1968, and contains over 9 billion barrels of recoverable petroleum, as well as much recoverable natural gas.[1] In the recent Recommendation to the President of the Federal Power Commission (FPC Recommendation), dated May 1, 1977 on alternative proposals to construct a gas pipeline, the FPC describes the Prudhoe Bay field as containing "the largest accumulation of oil and gas ever discovered on the North American Continent" (p. III-6).

Construction of TAPS began in April 1974.[2] The owners acted through their agent, the Alyeska Pipeline Service Company (hereinafter Alyeska), which will also operate the pipeline.[3] The owners initially projected a construction cost for TAPS of just under $1 billion.[4] The latest estimates reflect capital expenditures of $8 billion plus $1.3 billion of overhead and capitalized interest.

The eight major oil companies holding interests in Alyeska are the following:

Sohio Pipeline Company	33.34%
BP Pipelines, Inc.	15.84

1. We have attached as Appendix B an extract from the so-called Van Poolin Study for the State of Alaska that describes recoverable reserves and the expected life of the field. Appendix A contains much basic cost data that we will refer to throughout this Protest.

2. The owning companies commenced construction under an agreement and grant of right-of-way authorized by the Secretary of the Interior pursuant to the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-55 and a further right-of-way lease between such owners and the State of Alaska.

3. Alyeska, a Delaware Corporation, was formed by the owning companies in 1970 under their TAPS Agreement of August 27, 1970.

4. New York Times, January 20, 1970, p. 63.

Arco Pipe Line Company	21.00
Exxon Pipeline Company	20.00
Mobil Alaska Pipeline Company	5.00
Union Alaska Pipeline Company	1.66
Phillips Petroleum Company	1.66
Amerada Hess Corporation	1.50

Consequently, the proposed tariffs represent 96.68 percent of the total ownership of TAPS.

Each of the foregoing companies is affiliated with a major producer in the Prudhoe Bay oil field. The companies joined in this venture pursuant to an agreement and right-of-way issued by the Secretary of the Interior under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185, and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-55.

Congress expressly provided in Section 205 of the Authorization Act that the owner companies would not receive any immunity from the operation of the antitrust laws (43 U.S.C. § 1654). Under the amendment to the Leasing Act, the Secretary of the Interior may request the Attorney General to complain to this Commission, if the pipeline is not operating "in complete accord with its obligations as a common carrier" (30 U.S.C. § 185(r)(5)).

While joining in the construction of the pipeline, the carriers are required to compete as common carriers in its operation. Unlike the railroad or motor carrier industries, where the carriers may establish common rates, the Congress has precluded that possibility here; and hence even usual ratemaking standards like industry-wide averages may be out of place here. One pipeline has been constructed; but there are in effect eight different rates potentially to be considered.

In this Protest, we shall emphasize certain differences in costs among the owning companies. Rates based on costs will insure maximum competition. We urge that the Commission early resolve in these proceedings, (1) that the rates shall be cost-based, and (2) differences in costs warrant differences in rates.

2. *The Filed Rates May Exceed Just And Reasonable Levels Once The Cost Overruns Have Been Considered*

The enormous cost overruns connected with the construction of TAPS in themselves require the entry of an order of investigation. The potential disallowance of substantial sums from the rate base or other adjustment of a fair rate of return would necessarily have a direct impact on the allowable earnings of the respective owner companies.

The Commission recognized the need to study the economy and efficiency with which TAPS was constructed in its awarding a contract to Touche Ross & Co. on October 8, 1976, for an audit of the TAPS construction costs.[5] Although no definitive conclusions can be drawn as yet, the following issues are now under active review by Touche Ross, so that their effect, if any, on TAPS's costs will be measured:

1. The planning for costs, budgets, and facility capacities.
2. The organizing, staffing and directing of construction activities by Alyeska and others.
3. The labor contracts, employee compensation packages, labor support and labor efficiency.
4. The procurement, utilization, and maintenance of construction equipment.

5. See Press Release Nos. 215-76 and 114-77.

5. Controls over materials and supplies.
6. Rework of construction.
7. The terms and timing of owner company financing methods.
8. Compliance with environmental protection requirements.

For example, item number 6 above refers to "rework of construction." An unsually large number of pipe rewelds were required during the course of construction. In order even to obtain access to the faulty or questionable welds, large amounts of earth and backfill had to be excavated, since the affected pipe had often already been buried. The reasons for such rewelds must be explored as well as the downstream effects such a task would have caused, and a determination made as to whether any substantial part of these expenses was preventable under the circumstances.

As late as 1973, just a few months prior to actual construction, Sohio widely circulated an analysis of capital costs of TAPS and placed the cost of construction at $2.5 billion (excluding terminal) for capacity of 1.2 million barrels per day, and another $250 million to increase capacity to 2.0 million barrels per day. The following summarizes those estimates:[6]

6. Report by the Standard Oil Company, submitted to the Subcommittee on Public Land of the House Committee on Interior and Insular Affairs on April 19, 1973, and reprinted in "Rights-of-Way Across Federal Lands: Transportation of Alaska's North Slope Oil," Hearings on S. 970 before the Senate Committee on Interior and Insular Affairs, 93rd Cong., 1st Sess., Part 4 (May 3, 1973), table at p. 223.

	($ millions)
Line pipe and fittings	$ 143.0
Pipeline construction	1,298.3
Yukon River crossing	17.6
Roads	215.6
Pumping stations (12)	184.0
Communications	27.5
Materials handling	12.3
Design, engineering, research, aircraft	62.3
Offices and staff	101.2
Other	12.3
Contingency	103.5
Escalation for estimate update to June 30, 1972	359.0
Total for capacity of 1.2 million barrels per day	2,536.6
Capital required to increase capacity to 2.0 million barrels per day	250.0
TOTAL	$2,786.6

For a pipeline of 789 miles, Sohio estimated capital costs in 1973 of $2.79 billion, plus another $500 million for the Valdez terminal.[7]

In Appendix C we describe the evolution of the budget and cumulative costs associated with TAPS from under $1 billion in 1969 to over $7 billion in mid-1976. That figure is nearly $8 billion today, as we noted earlier, and does not include the $1.3 billion for interest during construction. The fact that the costs of construction have approached $9.3 billion suggests that perhaps the largest cost overrun

7. *Id.* at p. 577.

in the history of a privately financed business venture may have been attained.

Once the Commission has received the Touche Ross report, it must then investigate the problems uncovered by the report in an open forum. The report and the investigation could have a direct and significant bearing on the reasonableness of the proposed rates. Clearly, no rate should receive even the tacit approval of this Commission until it has thoroughly considered the full record regarding the cost overruns.

3. *Conditions Requiring The Production of Documents Must Be Added To The Permission To File Temporary Rates To Protect The Integrity Of The Investigation*

We have found that the companies and Alyeska have not supplied all relevant documents that they have on file describing among other things the planning, construction progress, and cost controls, that are the subject of the Touche Ross contract. Touche Ross has met with resistance to meaningful disclosure of records, and has relatively little of the relevant owner company records.

Touche Ross reported the following in a letter to the Commission's Bureau of Accounts of May 27, 1977[8]:

> It is abundantly clear from our various conversations that procedural access problems are a long way from being resolved. It further appears that access through Alyeska to third-party documentation and/or personnel is far from resolution. Access problems with regard to third parties may have to

8. "CMC" refers to Construction Management Contractor. "EC" refers to Executive Contractor. "OM&M" refers to O'Melveny & Myers.

be resolved separately, with eight separate Owner companies, the individual CMCs and ECs.

To date we have presented approximately 400 document requests. Of these approximately 175, representing about 2,500 separate documents have been received. OM&M has asserted the attorney/client priviledge [sic] on 101 documents and, in addition have not supplied documents for the following reasons:

Not locatable, missing, do not exist, wrong identification number.	18
Temporarily withheld.	4
Documents on microfiche—available for later review.	54
	76

The delay in resolving the issues raised in our May 12 meeting indicates that the access situation has not changed and may well deteriorate as we press for increased amounts of specific information. We believe that the current situation does raise some doubts about the practicality of our proposed comprehensive analysis approach in the time frame currently planned. The access situation, in our view, should be monitored closely during the next two to three weeks to determine an appropriate course of action for the project.

The owner companies have placed an unwarranted burden on Touche Ross to identify specific documents. We believe that Touches Ross should be permitted to see broad categories of documents, and that Alyeska and the owning

companies should not be permitted to impede that important study.

Consequently, we urgently request the Commission to attach to its I. & S. order both a permission to file on the lower basis described later in this Protest and a condition that the refiling is permitted upon the agreement of the owning companies to submit for the Commission's inspection and copying the records and documents listed in Appendix D hereto.

Clearly, if Touche Ross is to provide this Commission with a meaningful study of the cost overruns that have plagued the TAPS project, it must have access to all relevant documents and related personnel. Its efforts, we submit, are being frustrated and delayed, and the Commission now has the opportunity, which may not present itself again, to reverse these delays.

We suggest that the documents described in item 24(c) be submitted upon the refiling of the tariffs at the lower rate level. We further suggest that the Commission require the submission of the remaining documents within a period of 30 days in accordance with a schedule to be agreed upon by this Bureau and counsel for the companies.

4. *Commission Possesses Jurisdiction to Suspend with Permission to Refile at a Lower Level*

We shall show later herein that all the rates that have been proposed by the carriers at levels exceeding $6.00 per barrel should be suspended, since they are prima facie unreasonable. However, some rates must be filed to permit the pipeline to operate pending the investigation. We will show that rates ranging from $4.54 to $5.00 constitute proper rates for this purpose. In summary, the Commission must consider conditioning the suspension order with

permission to refile lower rates on short notice in order to allow the transportation to commence.

Suspension power. Under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. §15(7), the Commission is empowered to enter upon a hearing whenever a "new" rate if filed, and pending such hearing and decision thereon to suspend the operation of "such schedule" for up to seven months.[9] If the Commission suspends and the hearing has not been concluded in the seven-month period, the carrier can make its proposed rate effective.[10] Since the suspension power applies to any "new" rate, the Commission has long and continuously held that it applies both to changed and to initial rates.[11]

We briefly note in passing that the tariffs that were extended voluntarily from June 20 to June 30 continue to be initial rates subject to the suspension power. Once previously filed rates have been canceled by a carrier under special permission before becoming effective, the next filed rates become the initial rates subject to the suspension power.[12]

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9. See also Section 216(g) of the Act, 49 U.S.C. § 316(g).

10. The Commission has not distinguished between changed and initial rates here. The statute provides that only a changed rate automatically becomes effective as a matter of law at the expiration of the seven-month period. The Commission could, although we are not aware that it ever has, require a carrier filing initial rates to *move* to make them effective at the end of the seven-month period as the Federal Power Commission has done (see Appendix H hereto).

11. Among the many cases in which initial rates have been suspended are the following: *Machinery from Salt Lake City—International Transport, Inc.*, 304 I.C.C. 286 (1958); *Clay from Greybill, Wyo., to Points in the Middle West*, 314 I.C.C. 705 (1961); *Animal Feed from Mississippi and Tennessee to Midwest and Southwest*, 316 I.C.C. 94 (1962); *Foodstuffs & Agricultural Commodities, Calif., & Ariz., to West & South*, 329 I.C.C. 321 (1966); *Animal Food, Middlewest to California, Idaho, and Utah*, 332 I.C.C. 87 (1967).

12. *E.g. Dicalcium Phosphate from Bonnie, Fla., to Various States*, 314 I.C.C. 632 (1961).

Permission to refile on a lower basis. In the suspension order, the Commission should advise the carriers that it will not suspend initial rates that equal demonstrated costs and that its order of investigation will encompass the lower rates filed by the carriers in response to the suspension order. The carriers will thereby obtain the option of filing at a lower level and participating in the investigation on that basis, or awaiting the expiration of the suspension period to make their proposed rates effective and participating in the investigation on the basis of those rates.

The Commission has often permitted the refiling on a lower basis pending the proceeding when proposed rates were prima facie unreasonable.[13] Such a permission is not a prescription of rates. To make this even more clear, the Commission should include a statement in its order that it is not prescribing rates within the meaning of *Arizona Grocery*.[14]

The order we here recommend would also avoid the procedural problems encountered by the Civil Aeronautics Board in the *Moss* case.[15] The Court of Appeals there reversed the Board's decision indicating to the carriers that a specified level of rates would not be suspended or investigated. Unlike *Moss*, the Commission here would in no way prejudge the outcome of its investigation of the lower rates.

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13. The practice is most common in general increase cases. *See, e.g.*, Ex Parte No. 259, *Increased Freight Rates, 1969*, 332 I.C.C. 590, 594-95 (1968).

14. *Arizona Grocery* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932).

15. *Moss* v. *Civil Aeronautics Board*, 430 F. 2d 891 (D.C. Cir., 1970).

5. *Temporary Rates Ranging from $4.54 to $5.00 for Individual Carriers are Justified and Should be Permitted on One Day's Notice*

In the "Background" section of this Protest, we suggested that consistent with the absence of antitrust immunity, the six tariffs separately present the question of the appropriate interim rates pending the investigation into the cost and valuation of the pipeline. We, therefore, propose to recommend a group of six rates ranging from $4.54 to $5 that the Commission should permit to become effective on one day's notice, and to serve as the basis for its investigation into the cost and valuation issues.

Even if the Commission accepts all the carrier's original construction cost figures in this interim period pending the investigation, it should not allow any rates higher than presently needed to cover the reasonably estimated costs plus fair return. Temporary or interim rates as high as we here recommend are likely to be found too high once the Commission has investigated, among other things, the numerous cost overruns. Rates ranging for the individual companies from $4.54 to $5, therefore, will necessitate the inclusion of a refund provision in any order authorizing their filing.

There are five basic elements of the pipeline rates that must be considered before the Commission can decide whether to suspend the published rates or any others that may be filed, namely,

(a) Operating costs.
(b) Depreciation.
(c) Removal costs.
(d) Return on valuation.
(e) Federal and State income taxes.

Let us then briefly consider each one.

Operating costs. The carriers have proposed operating costs that average 93 cents per barrel. This figure compares to the following projected figures used in other published studies:

Mortada study[16]	78¢
Drexel-Burnham[17]	51¢
Wainwright[18]	73¢

The proposed operating costs per barrel assume a throughput of only 1.2 million barrels per day. Most studies we have seen reflect an increase to 1.6 million barrels by about 1980.[19] Arco advises us that, (1) it uses a 4.3 year average flow for the initial tariff, and (2) it expects to attain 1.6 million barrels per day by mid-1980. For the first 4.3 years, Arco's average flow rate will be about 1.3 million barrels/day. Moreover, the carriers' average figure of 93¢/B requires investigation since it may reflect further cost overrun. For purposes of an interim rate only, we recommend that the Commission use the carriers' proposed figure of 1.2 million B/day, and operating expenses projected by each carrier.

Depreciation.[20] The carriers propose average depreciation and amortization of 83¢ per barrel based on investment,

16. "The Determination of Equitable Pricing Levels for North Slope Alaskan Crude Oil" prepared for FEA by Mortada International, Dallas, Texas (November 1, 1976). A copy of Chapter IV of this Study is attached hereto as Appendix E for the information of the Commission. See pp. IV-19 and IV-23 of that Study, which refers to 52¢ for operations and an additional 26¢ for property taxes.

17. "The North Slope: Paradise Lost? An Industry Analysis." Drexel Burnham & Co., Inc., April, 1976, Table II-B for 1978.

18. "Petroleum Industry," Wainwright Securities, Inc., April 1, 1977, Table 10, or 40¢ for operations and 33¢ for property taxes.

19. For example, see Mortada study, App. E hereto, at p. IV-20.

20. Including amortization of overhead and capitalized interest during construction at 6 percent.

excluding land, of $9.280 billion and a service life of 25 years. In later pages, we show that a 25-year life is too conservative, even for interim rates, and that the Commission should use not less than 27.5 years as the projected service life. For a service life of 27.5 years, the annual average depreciation and amortization is 77¢/barrel,[21] which should then be apportioned to each carrier in accordance with its percentage of ownership.

Removal costs. The carriers report that they commissioned a study of the costs of removing the pipeline and restoring the surface. We have not seen this study, but it nevertheless raises certain conceptual questions that we later discuss. The carriers advise that the study projects a one-time cost, 25 years hence, of $1.049 billion, which some of them adjust for inflation. If amortized over 25 years, the annual average cost in 1977 dollars becomes 9.6¢ per/barrel. Consistent with our treatment of depreciation expense in this interim period, we recommend the use of a 27.5-year life, and hence amortize the removal costs in current dollars on the basis of 8.7¢/barrel,[22] which also may be apportioned on the basis of percent ownership.

Return on valuation. The fair return on valuation standard to compensate both the debt and the equity holders in the pipeline carriers is now under review in Ex Parte No. 308 (Sub-No. 1). We recommend that those standards be explored as well in this proceeding in the context of the particular circumstances surrounding the construction of this pipeline.

We will later show that the very high rates exceeding $6 that are proposed here seem to reflect an irrational allowance of the *entire* return on valuation as a return

21. ($9.280 billion ÷ 27.5 years) ÷ 438 million barrels.

22. ($1.049 billion ÷ 27.5 years) ÷ 438 million barrels.

solely for the stockholders. Only in this way can we understand the total returns of over $2 for equity and $1.59 for interest, which the carriers seemed to propose.

In the meantime, we recommend that the Commission employ a 10 percent return on valuation as it has historically been computed without prejudice to reconsidering the various elements of value that enter into the rate base computation. We recognize that the Commission has relied in the past on an 8 percent return on valuation for crude oil pipelines.[23] Use of that standard here, however, would limit the return on equity to less than 6 percent. A return on valuation of 10 percent comports with the results of recent studies we have seen on the TAPS initial tariff rates, as follows.[24]

	Tariff Rate (¢/B)	Returns for (¢/B)			Implied Percent of Valuation
		Debt	Equity	Total	
	(1)	(2)	(3)	(4)	(Col. 4 ÷ 2225)[25]
Mortada	450	157	72	229	10.3%
Drexel-Burnham	460	149	83	232	10.4
Wainwright ...	423	160	56	216	9.7

An original cost rate base would amount to about $9.295 billion, including $9.28 billion for improvements and $15 million for land, if we accept for present purposes the entire construction cost without adjustment for cost overruns. The valuation becomes $9.747 billion once reproduction cost and other elements of the valuation are

23. *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I.C.C. 41, 53-54 (1944).

24. For references to the sources of these figures, see Appendix A hereto, p. 3.

25. 2,225¢/B based on $9.747 billion ÷ 438 million B/yr.

included. Consequently, a 10 percent return is equivalent to an annual cost of 222¢/barrel.[26]

Federal and State income taxes. For many years, the Commission has recognized only actual taxes, rather than imputed or "normalized" taxes in its rate cases. In the *Williams* case,[27] it allowed normalized taxes. We recommend that the Commission use normalized taxes on an interim basis until the actual tax rates can be determined. The Commission should expressly recognize that such taxes will not be paid at least in the forseeable future. They, therefore, provide a substantial cushion in the interim rates that in themselves warrant the addition of a refund provision in the order.

"Normalized" taxes here refer to the statutory Federal rates of 48 percent and the State of Alaska rate of about 9.4 percent. Since the State tax is deductible for Federal purposes, the effective overall income tax rate on a normalized basis is 52.9 percent. The normalized tax computation follows:

1. Return on valuation	222¢/B
2. Less deductible interest	159
3. Return for equity after taxes	63
4. Equivalent percent (100%-52.9%)	47.1%
5. Return for equity before taxes (line 3 ÷ line 4)	133.8¢/B
6. Income taxes (line 5 − line 3)	70.8¢/B

26. ($9.747 billion x 10%) ÷ 438 million barrels. We do not mean to suggest that reproduction cost will increase the valuation once the original cost investigation has been concluded, or that the concept of reproduction cost will ultimately have any application here.

27. *Petroleum Products, Williams Brothers Pipe Line Co.*, Docket No. 35533, decided by the entire Commission on reconsideration December 3, 1976.

Summary. Based on the foregoing, the average interim rate becomes $4.72 based on the following average costs:

Operating costs	93¢/B
Depreciation	77
Removal costs	9
Return on valuation	222
Income taxes	71
Avg. interim rate	432¢/B

The carriers have reported to the Bureau of Accounts that their interest costs in 1978 will be $695 million (see App. A hereto), or less than 159¢/B, leaving 63¢/B for equity. Since equity comprises less than 15 percent of capitalization, the equity component is about 318¢/B,[28] and the return for equity under the recommended interim rate will average a generous *20 percent after taxes.*[29]

On the other hand, as we explained earlier, we do not recommend that the Commission employ an average interim rate. The maximum interim rates justified for the individual carriers are shown below:

Carrier	Percent Ownership	Total Costs & Return[30]	Max. Interim Rate (¢/B) (col. 2 ÷ col. 1) ÷ 438 mill.
	(1)	(2)	
Sohio	33.34%	$ 662.5	454
ARCO	21.00	446.3	485
Exxon	20.00	438.2	500
BP	15.84	318.5	459
Mobil	5.00	105.2	480
Union	1.66	36.3	499
Phillips	1.66	35.3	486
AmHess	1.50	30.2	460
Totals	100.00%	$2,072.5	473[31]

28. (15% x $9.295 billion) ÷ 438 barrels = 318¢/B.

29. 63¢ ÷ 318¢ = 19.81%. The carriers' average cost of debt is 8.8 percent (*i.e.* $695 million ÷ (85% x $9.295 billion).

30. Appendix A, p. 1. Figures are in millions of dollars.

31. Differs from $4.72 due to rounding.

Consequently, interim rates of $4.54 to $5.00 protect the carriers, prevents exorbitant returns in an interim period, and, when combined with a reasonable refund provision, also protects the shippers and other interests affected by the rates.

6. *Proposed Rates Exceeding $6.00 Should Be Suspended, Since the Carriers Greatly Overstate Costs*

a. Carriers Overstate Depreciation

The carriers use a 25-year life to amortize the construction costs and capitalized interest associated with TAPS. For the original cost of $9.2 billion, including capitalized interest of $1.3 billion, the carriers project average depreciation and amortization expense of 84 cents per barrel.[32] Since the carriers have understated the life of the pipeline by failing to use at least a 27.5-year life, they have overstated this expense.

In the FPC Recommendation of May 1, 1977, that commission found, as follows (at p. III-19):

> Natural recovery mechanisms (without the injection of produced water) should result in recovery of from 32% to 35% of the original oil in place (OOIP). *This oil recovery should be achieved over a period of 25 to 30 years.* (emphasis added)

The FPC relied on, among others the Van Poolin study (see Appendix B hereto) which describes a similar range.

One of the basic studies of oil and gas production presented on that record was Exhibit EP-53, a three-dimensional computer model, sponsored by El Paso Alaska Company. That study as described by the administrative law judge, estimated deliverability of oil from the main area over a period of 28 years.[33]

32. ($9.2 billion ÷ 25 years) ÷ 438 million barrels per year. The latter figure assumes an average flow-rate of 1.2 million barrels per day.

The range of 25 to 30 years also corresponds to the so-called "Mortada Study" prepared for the Federal Energy Administration in 1976. In that study, FEA's consultant assume 26.5 years for the life of TAPS for tariff computation.[34]

Other studies have relied on much longer periods of life for TAPS. For example, in a financial study of TAPS by Wainwright Securities, Inc.[35] earlier this year, the operating life of 35 years was used (at p. 40) to compute a tariff rate of $4.23 and TAPS' potential earnings. None of these studies increase service life to account for production in fields adjacent to the main one for the purpose of the tariff computations.

The carriers, therefore, have chosen the lowest pipeline service life over which to depreciate and amortize costs. We believe the mid-figure (*i.e.* 27.5 years) of the conservative range found by the FPC is more reasonable for purposes of the present initial rates than the low end chosen by the carriers. There are definite indications that such mid-figure is a minimum figure; and that following investigation, a longer life will be shown for TAPS.

b. Carriers Overstate Removal & Restoration Costs

The same problem of useful life inheres in the carriers' proposed annual accrual to cover the projected one-time

33. See Initial Decision in El Paso Alaska Company, Docket No. CP 75-96, Feb. 1, 1977, p. 29.

34. Appendix E hereto, p. IV-19. The FPC also relied on this study. See Recommendation, p. III-B-1.

35. Wainwright study, *supra*, at p. 40.

cost of at least $1.049 billion to remove the pipeline and related facilities and to restore the surface to its former state at the end of the service life of the pipeline, or what has also been termed TAPS' "negative salvage value." Assuming a 25-year life, the carriers seek to recover the one-time future expense over a period of 25 years, and hence seek to charge the shippers at least $41.96 million per year or 9.6 cents per barrel per year.

On the other hand, the carriers differ among themselves over how much should be amortized with at least one carrier claiming total removal and restoration costs, including 25 years of compounded inflation, of over $4 billion. The differing estimates submitted by the carriers are set forth below:

	($ Millions) Annual Amount of Removal Costs Reported to Bur. of Accts.	Percent of Total	Total Cost Assumed by Carrier (Col. 1-Col. 2) x 25 Years
Amerada Hess	$ .629	1.50%	$ 1,048
Phillips	.6965	1.66	1,049
Sohio	14.0	33.34	1,050
Union Alaska	.697	1.66	1,050
BP	7.178	15.84	1,133
Arco	13.2	21.00	1,571
Exxon	16.4	20.00	2,050
Mobil	8.513	5.00	4,257

At the outset, we have doubts that all these monies will be used even in 1977 dollars, or that it is fair to begin collecting such sums so early. Under the Agreement and Grant of Right-of-Way between the Department of the Interior and the carriers of January 23, 1974, the carriers are obligated to rehabilitate property or a natural resource

that has been "seriously damaged or destroyed" (para. 13A), which is yet to be defined. The carriers are not obligated even on termination to rehabilitate any area affected by an act of war or negligence or willful misconduct of others using the property (*Id.*).

The qualifications to the carriers' alleged liability to rehabilitate must obviously be taken into account in an investigation before shippers are required to provide full indemnity, and allowance must be made by the Commission for these important factors. In such matters, it would not be consistent with shipper interests to resolve all doubts in favor of higher tariff rates.[36] The interim rates in the meantime should reflect no greater amortization than the $1.049 billion over 27.5 years.

7. *Proposed Rates Exceeding $6.00 Should Be Suspended Since the Carriers Overstate Their Revenue Need*

We have reproduced in Appendix A, p. 2, hereto the expense figures supplied to us by each of the pipeline carriers. We have not received actual costs of equity figures. Nevertheless, we are convinced that in no case would the total expense column, including return, reach the over six-dollar tariff rates that are the subject of this protest.

We must surmise how the carriers reach such high tariff rates. We need not look long, however, for it seems the parent companies have represented to the FPC that this Commission will allow the carriers' equity holders to retain the entire return on valuation, and that interest expense must be accounted for separately as an "operating expense."

36. See *Bebchick* v. *Public Utilities Commission*, 318 F.2d 187, 192-94 (D.C. Cir. 1963), cert. denied, 373 U.S. 913, involving a track removal and repaving obligation of a bus company.

For example, the parent companies of these carriers represented to the FPC in the recently concluded gas pipeline case that the ICC would generously allow them *30 percent* returns on equity, as follows:[37]

> The only comparable project of the size and complexity discussed herein that has received private financing is the Alyeska oil pipeline. If that line receives the usual ICC treatment of allowing a 7-8 percent rate of return *after taxes and interest* on ICC valuation (i.e. total assets), and a 75/25 debt to equity ratio is assumed, the after-tax return on equity would be in the 28-32 percent range. (emphasis theirs).

The FPC refused to accept such an expectation as any reasonable estimate of the cost to attract capital to the pipeline industry:[38]

> Since, however, the major consideration of the oil producers, who were the ones to finance the oil pipeline, was to get the oil to market, it is difficult to draw any conclusions regarding the rate of return on their pipeline investment they "required" in order to finance it.

The FPC considered instead the actual profitability and financial structure of the integrated petroleum companies. It found that in the 1966-1975 period on average the companies earned 11.8 percent after-tax on equity, and during the three-year period 1973-1975, earned an average after-tax return on equity of about 14.8 percent.[39]

37. FPC Recommendation, *supra*, at p. XII-45. The FPC allowed 18% on equity, after taxes, which it reduced to 11% if cost overruns should become excessive.

38. *Id.*

39. *Id.* We have attached as Appendix F hereto the Chase Manhattan Bank financial statistics for the group of 28 petroleum companies on which the FPC relied (*i.e.* App. XII-A of the Recommendation).

Aside from a bare table of figures in the recent *Williams Brothers* case,[40] where the matter was not discussed, we fail to find any other reported pipeline rate case that awards the entire return on valuation to the equity holders of the pipeline. On the contrary, we find indications that "the usual ICC treatment" of this matter is to allow the return on valuation to cover the pipeline's total cost of capital, that is, both long-term interest and all payments to stockholders.

For example, in *Reduced Pipe Line Rates and Gathering Charges*, 243 I.C.C. 115 (1940), the Commission on its own motion entered into a general investigation in 1934, which, as subsequently broadened, included all the rates, rules and practices of 37 carriers by pipe line. The Commission served the respondents with a questionnaire requiring the submission of financial, property and rate data for a 5-year period; later years were added in the reopened proceeding.

For the year 1935, the last full year for which the Commission had data, it computed the excess earnings of the carriers over an 8 percent return on value in a seven-column appendix (at p. 148). The columns were headed as follows:

1. Transportation revenue.
2. Transportation expense including depreciation and taxes.
3. Earnings or excess of revenue over expense.
4. Value of property used.
5. Return on value.
6. Earnings needed to return 8 percent on value.
7. Excess actual earnings over 8 percent return.

It is significant here that "transportation expense" (col. 2) excluded interest, which was to be covered by "earnings or

40. Docket No. 35533, *Petroleum Products, Williams Brothers Pipe Line Company, supra*, esp. at p. 16.

excess of revenue over expense" (col. 3) and hence by the return on value (col. 5). To show that this was in fact the Commission's method of calculation, we have recomputed the "transportation expense" figures in the *Reduced Rates* table for 5 carriers from reported figures for 1935 that are known to exclude interest.[41] They equal the expense figures that the Commission relied on in Appendix D.

Pipeline Co.	Interest on long-term debt	Transp. Expense[42] (excluding interest)			Transp. Exp. in App. D
		Operating	Taxes	Total	
(1)	(2)	(3)	(4)	(5)	(6)
Arkansas Pipe Line Co.	24	219	120	339	339
Gulf Pipe Line Co. of Pa.	133	971	760	1,731	1,731
Pure Transportation Co.	1,086	1,443	621	2,064	2,064
Shell Pipe Line Corp.	1,208	7,157	1,876	9,003	9,034
Tide-Water Pipe	10	486	181	667	667

Accordingly, the long-standing practice of the Commission in fact has been to include interest as an element of the return on valuation for pipelines.

It cannot logically be otherwise. The rate base includes the entire investment in used and useful property; and the rate of return is developed from the costs of the entire capital devoted to the enterprise. The "capital costs of the

41. See Transport Statistics, 1935, p. S-161. The figures for three other carriers are impossible to reconcile with the Appendix D data; the figures of at best one other carrier include interest.

42. *Id.*

business . . . include service on the debt and dividends on the stock."[43] As Prof. Westmeyer has succinctly stated:[44]

> In other words, a fair return must be sufficient to enable the railroad industry [or other mode of carriers] to maintain its credit by making regular payments at acceptable rates of interest on its fixed obligations, and if there is any expectation of financing improvements by the sale of stock, an acceptable rate of dividends must be paid as well.

It appears that TAPS will be capitalized with about 15 percent equity and 85 percent debt. Since a 10 percent return on valuation is equivalent to 222¢/B, and 15 percent of the original cost is equivalent to 318¢/B,[45] the allowance of the entire return on valuation to the stockholders means an effective return on equity of *70 percent*.[46]

It is true that in 1941 most of the owning companies signed a consent decree with the Department of Justice placing a restriction on dividends of 7 percent of valuaton.[47] In 1957 the Department of Justice brought a suit contending that the carriers' payment of 7 percent of valuation to their stockholders did not result in a "fair" dividend. The Supreme Court held that, nevertheless, the parties to the decree had so agreed, and the Court could not read the decree differently,[48]

43. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

44. Westmeyer, Russell E., *Economics of Transportation*, Prentice-Hall, Inc., p. 208 (1956).

45. (15% x 9.295 billion) ÷ 438 million B/yr.

46. 222¢ ÷ 318¢ = 69.8%.

47. *United States* v. *Atlantic Refining Co.*, C.A. No. 14060, D.D.C. decided December 23, 1941.

48. *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 24 (1959).

> simply because another reading might seem more consistent with the Government's reason for entering into the agreement in the first place.

As we next show, (1) the dividend restriction was worded the way it was apparently because the pipeline industry in 1940 had virtually no long term debt, and (2) that with so much debt capital having replaced the equity capital of the carriers, a dividend restriction now provides no standard for a fair return.

In Appendix G hereto we have reproduced Table 6 from the Verified Statement of David L. Jones, an economist and witness for this Bureau in Ex Parte No. 308, *Valuation of Common Carrier Pipelines.* The last column of that table shows that in 1940, the funded debt of the oil pipeline industry was merely *10 percent* of total capitalization. Consequently, in 1941, the Department no doubt believed that in those circumstances a dividend restriction of 7 percent of valuation provided an effective limitation on both earnings and payout, although worded only in the form of a restriction on payout. It apparently took the industry about five years to discover that a higher debt/equity ratio would permit their lawfully circumventing the decree.

Appendix G shows that by the mid-forties the industry began to shift from a low debt/equity ratio to a high one. In this way, the oil companies could reduce equity investment and convert an overall 7 percent return, that resulted from the payout restriction, to a much higher return on equity.

For example, let us assume that in 1940 the valuation was equal to capitalization. The changes that occurred in the debt/equity ratio over the years produced the following increases in the return on equity in the absence of any effective protests or complaints before this Commission:

Year	Capitalization		Effective Return on Equity at 7% of Valuation
	Percent Debt	Percent Equity	
1940	10%	90%	7.7%
1950	64	36	19.4
1960	73	27	25.9
1970	82	18	38.9
1975	93	7	100.0

The consent decree has been treated as purely a dividend restriction by the pipeline companies, and exploited to produce large returns on equity. The consent decree payout limitation is clearly no standard for just and reasonable earnings on equity, and should not be followed by this Commission in this proceeding.

The Commission should not accept, even on a temporary basis, rates like those proposed in the subject tariffs that are premised on granting the entire return on valuation to the carriers' equity holders.

8. *Any Order Permitting Interim Rates Ranging From $4.54 to $5.00 Should Include a Condition Providing for Possible Refunds*

We have shown that rates ranging from $4.54 to $5.00 will leave substantial room for investigation into the maximum reasonable level. Users of the pipeline, therefore, should receive a refund, if it is later held that the filed rates are unjust or unreasonable.

Section 15(7) of the Act expressly provides for refunds of "increased" rates. An initial rate has been "increased" only in the sense that there has been a change from zero to some number. Thus, the Commission's jurisdiction to order a refund of an initial rate is not clear in the statute, although it is clear that the Commission would have jurisdic-

tion to award reparation, if the initial rates were found unreasonable.

The Commission should now simplify the shippers' remedy to obtain a refund. An express refund provision would operate automatically,[49] as well as protect the Commission's jurisdiction to accomplish that simplification. The inclusion of an express refund provision and other conditions now would grant the carriers the option of refiling at the lower basis subject to such conditions, or awaiting the expiration of the seven-month suspension period for their originally filed rates to become effective.

Close in point is *United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500, 49 L. Ed. 2d 14 (1976), sustaining the Commission's conditional no-suspend order in Ex Parte 305.[50] Just as in that proceeding, the Commission here could simply suspend the rates for the full seven-month period; but, the Ex Parte 305 conditional order is also available as an alternative. As the Court continued (49 L. Ed. 2d at 23-24), the Commission,

> pursued a more measured course and offered an alternative tailored far more precisely to the particular circumstances presented.
>
> • • •
>
> They [the carriers] had the option to continue to insist on an unconditional increase, to submit proof of their reasonableness to the Commission and, if successful, or if the investigation were not completed within the statutory seven-month period, to collect rates based on the new tariffs.

49. *See Increased Freight Rates, 1969*, 337 I.C.C. 436, 438 (1970).

50. *Nationwide Increase of Ten Percent in Freight Rates and Charges, 1974*, decided August 9, 1974.

There is a further jurisdictional basis for a refund condition here, since it is tantamount to the exercise of express statutory authority to grant reparation. Under Section 16 of the Act, 49 U.S.C. § 16, the Commission is directly authorized to grant an "award of damages" upon the filing of a complaint. The protests that are being filed today are equivalent to complaints, since the protestants in this case, unlike the typical increase proceeding, undertake the burden of proof.[51] Consequently, a refund condition here merely serves as notice in advance that the Commission will award damages if the protestants fulfill their burden of showing that the new rates made effective by the pipelines are unreasonable.

There was a dissent in the *C&O* case on the grounds among others that the conditional rate increase in Ex Parte 305 was intended to effectuate policies that were unrelated to the maintenance of "the integrity of the ratemaking process" (49 L. Ed. 2d at 31). The present case for a conditional rate increase, therefore, is stronger than in Ex Parte 305 for the further reason that the need for conditions here lies at the heart of the entire ratemaking process for new pipeline rates. A suspension of the rates for seven months here does not merely postpone increases, but rather stops all operations, and hence some rates must be allowed. Unless the Commission can order refunds, it will be completely thwarted in exercising any effective ratemaking power for the pendency of the proceeding.

Also in point is *Admiral-Merchants Motor Freight, Inc.* v. *United States*, 321 F. Supp. 353 (D.C. Colo. 1971), *aff'd* 404 U.S. 802, sustaining a refund provision attached by the Commission as a condition to its allowing an extension of

51. We distinguish burden of proof from burden of going forward. The carriers possess the latter burden, since they are also the sole possessors of much information and data relevant to the issues.

time in the context of a motor carrier case, where it had no direct statutory authority to grant refunds. As the District Court stated, the order in question "was not unlike the exercise of the suspension power" (at 359). When the carriers accepted the benefits of the extension of time and withdrew their objection to the refund condition, the Court held that the carriers might not later renege on making refunds (at 359-60).[52] But, as we have shown, the Commission's jurisdiction to add a refund provision here goes beyond the mere grant of a benefit to the carriers, and hence presents a stronger case for the exercise of that power than in motor carrier cases like *Admiral-Merchants.*

Interest. Refunds of rates later found to be excessive should be ordered with compounded interest at 9 percent per year. Section 15(7) specifically refers to interest without any reference to the rate of interest. The Commission has often used a rate of 4 percent; but that rate was first adopted in 1946,[53] and has outlived its relevance. In fact the prime rate in 1946 was less than 2 percent in New York City.[54]

The experience of the Federal Power Commission with pipeline refunds is instructive. The current rules of the FPC prescribe automatic accounting and refund provisions with interest at *9 percent,* when increases are made effec-

52. Such an order may be enforced at the suit of individual shippers (see *Aluminum Co. of Amer.* v. *Admiral Merchants M. Freight,* 486 F.2d 717 (7th Cir. 1973), cert. denied, 414 U.S. 1113; *S.S. Kresge Co.* v. *A&B Transfer, Inc.,* 488 F.2d 894 (6th Cir. 1973), cert. denied, 415 U.S. 960. Or, it may be enforced in a class action. See *Appleton Elec. Co.* v. *Advance-United Expressways,* 494 F.2d 126 (7th Cir. 1974).

53. See *Christensen Bros. Feed Co.* v. *Great Northern Ry. Co.,* 303 I.C.C. 45, 46 (1958).

54. 33 *Federal Reserve Bulletin* 63 (Jan. 1947).

tive by natural gas pipeline companies at the expiration of a suspension period. A copy of the relevant rule, which also includes a form of "agreement and undertaking" that must be signed by such companies when making suspended rates effective,[55] is attached as Appendix H for the convenience of the Commission.

9. *Rules and Regulations in the Proposed Tariff May Be Unreasonable and Anti-Competitive*

Several of the rules and regulations in the proposed tariffs may violate prior holdings of this Commission, or are otherwise unlawful, and should be investigated.

Minimum Tender. The BP tariff requires the tender of at least 30,000 barrels over a thirty-day period from one shipper consigned to one consignee and one destination (Rule 6). The Amerada Hess tariff requires a minimum tender of 5,000 barrels (Rule 4); and the Sohio tariff, 10,000 barrels (Rule 25). The minimum of 10,000 barrels may be met by two or more shippers to a common consignee under the Mobil Alaska tariff (Rule 19).

In *Reduced Pipe Line Rates and Gathering Charges,* 243 I.C.C. 115, 136 (1940), the entire Commission found that a 10,000-barrel lot is as large as it could find reasonable to serve as a minimum tender, and that any higher minimum would be unreasonable.[56] The Commission noted that the large refiners can meet a large minimum-tender require-

55. 18 CFR 154.67. FPC Order No. 513-A issued in *Rate of Interest on Amounts Subject to Refund,* Docket No. RM74-18, July 14, 1976, *expands* the application of the 9 percent rate in accordance with the opinion of the Court of Appeals in *American Public Gas Ass'n* v. *Federal Power Comm.,* 546 F.2d 983 (D.C. Cir. 1976).

56. *Cf. Restrictions on Service by Motor Common Carriers,* 126 M.C.C. 303, 324-25 (1977), proscribing unreasonable minimum weight requirements.

ment "without difficulty" (*Id.*); but smaller refiners could have difficulty.[57]

Minimum Delivery. Unlike the other pipelines, the ARCO tariff (ICC No. 1030) provides: "Carrier will not make a delivery of less than 100,000 Barrels of Petroleum at destination point on its Pipeline except when necessitated by dispatching contingencies." The provision excludes using a smaller vessel, if the larger one is unavailable. The Commission in the *Reduced Rates* case characterized a similar rule as just another form of minimum shipment (272 I.C.C. at 382).

Carriers' Liability. All the carriers proposed rules limiting their liability for, among other things, loss of petroleum and failure to receive or deliver petroleum.[58] These provisions seem inconsistent with the requirements of Section 20(11) of the Act, 49 U.S.C. §20(11), rendering a common carrier liable for full actual loss, damage or injury and declaring any limitation of liability "unlawful and void."

Penalty Provisions. Rule 45 of Sohio's ICC No. 742, provides a series of penalties for the shipper's violation of the carrier's rules for efficient scheduling and use of the Valdez Terminal. For example, in paragraph (E), the rule imposes a 20-cent per barrel penalty on those barrels "by which Carrier's Working Inventory exceeds the Carrier's Working Capacity." Then in paragraphs (G) and (H)

57. The decision on this point was later affirmed on further hearing (272 I.C.C. 375, 382-83 (1948).

58. Amerada-Hess, ICC No. 2, Rules 15-17; BP's ICC No. 1, Rules 16-18; ARCO's ICC No. 1030, Rules 14-15; Sohio's ICC No. 742, Rules 60, 65 and 70; Mobil Alaska's ICC No. 1, Rules 11-13.

5-cent penalties are provided. The others have similar provisions.[59]

Demurrage. BP's ICC No. 1, Item 11, provides for heavy demurrage charges ($2,000 per *hour*) for vessels operating at Valdez; the same provision is found in Amerada Hess' ICC No. 2, Item 8.

These rules and others should be included in the investigation order.

CONCLUSION

We respectfully request the Commission to enter an order of investigation and suspension relating to the six filed tariffs and others that may be filed in excess of the interim levels here recommended.[60] The Commission should incorporate a proviso in its order, to the effect that special permission is granted to cancel the proposed rates, and to file and to make effective the following rates on not less than one day's notice pending the hearing and decision in the ordered investigation:

Filing Carrier	Permitted Interim Rate
Sohio	454¢ Lb.
Arco	485
Exxon	500
BP	459
Mobile	480
Union Alaska	499
Phillips	486
Amerada Hess	460

59. *E.g.* ARCO's ICC No. 1030, Item 7; BP's ICC No. 1, Item 10; Amerada Hess' ICC No. 2, Items 8, 9, 10; Mobil Alaska's ICC No. 1, Rule IV.

60. The two carriers that have not yet filed are Union Alaska Pipeline Company and Phillips Petroleum Company.

Protest of ICC Bureau of Investigations and Enforcement.

We further request that the Commission condition the foregoing proviso with the requirement that each carrier that files an interim rate thereunder shall expressly consent to keep account of all rates and charges collected during the period of the investigation, and thereafter refund any sums ordered by the Commission following the conclusion of its investigation.

We also request that the Commission condition the foregoing proviso with the requirement that each carrier filing an interim rate thereunder shall expressly consent to comply with the request for documents set forth in Appendix D hereto within 30 days from the date of the order upon a schedule to be agreed between such carrier and counsel for this Bureau.

Respectfully submitted,

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[Certificate of Service omitted in printing]

Protest of ICC Bureau of Investigations and Enforcement.

Appendix A
Page 1 of 4

TRANS-ALASKA PIPELINE SYSTEM
OPERATING EXPENSES, DEPRECIATION, INTEREST, AND REMOVAL AND RESTORATION COSTS
AS ADJUSTED - FOR YEAR 1978
($ millions)

	Total 1978	Sohio	ARCO	Exxon	BP	Mobil Alaska	Union Alaska	Phillips	Amerada Hess
Operating Expenses	$ 408.2	134.4	90.3	80.0	64.7	19.7	6.5	6.3	6.3
Depreciation & Amortization[1]	337.5	112.5	70.9	67.5	53.5	16.9	5.6	5.6	5.1
Removal & Restoration[2]	38.1	12.7	8.0	7.6	6.0	1.9	0.6	0.6	0.6
Return on Valuation[3]	974.7	325.0	204.7	194.9	154.4	48.7	16.2	16.2	14.6
Reported Interest	695.1	255.6	140.2	116.4	118.9	32.7	9.6	10.3	11.4
Return for Equity	279.6	69.4	64.5	78.5	35.5	16.0	6.6	5.9	3.2
Imputed Income Taxes[4]	314.0	77.9	72.4	88.2	39.9	18.0	7.4	6.6	3.6
Total[5]	2,072.5	662.5	446.3	438.2	318.5	105.2	36.3	35.3	30.2

1 ($9.280 billion ÷ 27.5 years) X percent ownership
2 ($1.049 billion ÷ 27.5 years) X percent ownership
3 10% X $9.747 billion X percent ownership
4 (Line 6 ÷ 47.1%) - Line 6
5 Line 1 plus Line 2 plus Line 3 plus Line 4 plus Line 7

TRANS-ALASKA PIPELINE SYSTEM
OPERATING EXPENSES, DEPRECIATION, INTEREST, AND REMOVAL AND RESTORATION COSTS
REPORTED BY THE CARRIERS TO THE BUREAU OF ACCOUNTS
FOR YEAR 1978
($ millions)

	Total 1978	Sohio	ARCO	Exxon	BP	Mobil Alaska	Union Alaska	Phillips	Amerada Hess
Operating Expenses	$ 408.2	134.4	90.3	80.0	64.7	19.7	6.5	6.3	6.3
Depreciation[1]	364.7	126.2	77.2	73.7	52.0	18.1	5.8	6.1	5.8
Removal & Restoration[2]	61.3	14.0	13.2	16.4	7.2	8.5	0.7	0.7	0.6
Interest	695.1	255.6	140.2	116.4	118.9	32.7	9.6	10.3	11.4
Grand Total	$1,529.3	530.2	320.9	286.5	242.8	79.0	22.6	23.3	24.2

1 Based on a 25-year service life and varying assumptions on total investment.
2 Based on a one-time cost of $1.049 billion plus varying estimates for future inflation amortized over a 25-year period.

NOTE: Columns may not add due to rounding.

THREE PRIVATE STUDIES OF THE
PROJECTED FINANCIAL STATEMENT AND AVERAGE TARIFF RATE
OF THE TRANS-ALASKA PIPELINE SYSTEM
(in cents per barrel)

	Operating Expenses 1/			Depreciation & Amortization				Return and Income Taxes						Grand Total (Cols. 3+7+13)
	Operations	Property Taxes	Total	Depreciation	Amort. of Capitalized Interest	Negative Salvage Value	Total	Cost of Debt. (Int. on 174% c/b) Amount	Percent	Cost of Equity (Return on 308c/b) Amount	Percent	Income Taxes 2/	Total (Cols. 8+10+12)	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	
Mortada Study (FEA) (Nov. 1976)	52 3/	26	78	66 4/	11 5/	0	77	157	9%	72 6/	23%	66 6/	295	450
Drexel-Burnham & Co. (Apr. 1976) 7/	20	31	51	-	-	-	84 8/	149	8.5%	83	27%	94	326	460
Wainwright Securities, Inc. (Apr. 1977)	40	33	73	50 9/	12 10/	10.3 11/	72	160	9.2%	56	18%	63	279	423

See Footnotes - Page 4

1. Based on 1.2 million barrels per day or 438 million per year.

2. Since State incomes taxes are deductible for Federal income tax purposes, the 9.4% State rate and the 48% Federal rate are equivalent to a combined rate of 52.9%, or 48% + 9.4% − (48% × 9.4%).

3. The Mortada Study originally projected 27.4¢/B (p. IV-19), then added (p. IV-23), "A communication received from a North Slope owner shortly before going to print estimates the operating costs at 25¢/B higher than our estimate."

4. $7.7 billion over 26.5 years (p. IV-19).

5. $1.3 billion over 26.5 years (*id.*).

6. Computed as follows: the study recommends an average rate of $4.50. If we deduct all prior costs and interest, the balance is $1.38 for equity and income taxes. Since the study assumes an investment tax credit of 10% (p. IV-19), the effective tax rate is .476 (i.e. 90% × 52.9%) which leaves a cost of equity of 72¢ and taxes of 66¢.

7. All figures drawn from Table II-B for 1978.

8. $6.8 billion + $1.1 billion over 25 years (pp. IV-5, IV-6) = 72. Figure of 84 "arbitrarily calculated" (p. IV-6).

9. $7.7 billion over 35 years (p. 40), or $216.9 mill./yr. (Table 10).

10. $1.3 billion 25 years (p. 40), or $51 mill./yr. (Table 10).

11. $1 billion divided by 9.7 billion barrels (p. 41).

(Columns may not add due to rounding).

PREDICTION OF RESERVOIR FLUID RECOVERY
SADLEROCHIT FORMATION
PRUDHOE BAY FIELD

Prepared for

STATE OF ALASKA
JAY S. HAMMOND, GOVERNOR
DEPARTMENT OF NATURAL RESOURCES
GUY R. MARTIN, COMMISSIONER

by

H. K. van Poollen and Associates, Inc.

January 1976

Introduction

The basic objective of this study was to evaluate the relative oil recovery potential of the Sadlerochit Reservoir at Prudhoe Bay under a number of different operating conditions.

The reservoir was modeled in cross section, using a six-layered, two-dimensional, three-phase mathematical fluid-flow simulator. This work was preceded by a published volumetric study[1] and other independent, confidential

1. "In-Place Volumetric Determination of Reservoir Fluids, Sadlerochit Formation, Prudhoe Bay Field," State of Alaska, Department of Natural Resources, Division of Oil and Gas, June, 1974, H. K. van Poollen and Associates, Inc.

studies[1] based on proprietary information which were designed to develop the best basic data with which to describe initial reservoir geometry, volume, fluid and energy conditions. During December 1975, a preliminary summary of this study was issued. Since that time, five additional cases have been studied, and are reported as Run Nos. 25 through 29. Contents of the December 1975 preliminary report have been updated and corrected. It should be recognized that the preliminary report is superceded by the present report.

Boundary Conditions

General boundary conditions were established such that the following basic cases could be evaluated and compared:

1. Depletion drive with gas cap expansion and 92% gas reinjection (8% for field use) into the gas cap from the start of producing operations—no aquifer.

2. Depletion drive with gas cap expansion and 92% gas reinjection, supplemented by a moderate-sized aquifer.

3. Depletion drive with gas cap expansion, 92% gas reinjection, and a moderate-sized aquifer supplemented by water injection beginning 4.75 years after the start of production. Water injection rate was set at 125% of the maximum oil-producing rate.

4. All of the preceding cases were also considered with gas cap sales of 2 MMMSCF/D, and some cases with 3 MMMSCF/D, and 4 MMMSCF/D, beginning 2.75 years after the start of production. All gas sales rates were net after 12% removal to account for CO_2 content, and 100 MMSCF/D assumed for fuel consumption.

1. Studies prepared by H. K. van Poollen and Associates Inc., for the Department of Natural Resources, State of Alaska.

5. Ten special cases, all with aquifer, water injection and gas cap sales, where certain operating limits were changed:

   a. Five well groups were recompleted and GOR limits increased to 25,000 SCF/STB on all wells after 13 years (GOR limit otherwise was 15,000 SCF/STB and WOR limit was 3 STB/STB for all cases).

   b. Two more well groups were added near the gas-oil contact after 14.75 years to control the potential loss of oil into the gas cap.

6. Five of the above special cases had gas sales delayed until 6.75 years.

7. A range of maximum sustained oil-producing rates of 1.2 MMSTB/D, 1.6 MMSTB/D and 1.8 MMSTB/D was set for most of the preceding cases. All runs were scheduled to produce at 0.6 MMSTB/D for the first 3 months, 1.4 MMSTB/D for the next 12 months, and then at one of the above maximum rates until the start of decline.

A total of 29 cases were run and their results are summarized in Table I.

Summary

Listed in Table I are comparable numbers for each of the 29 cases run where the end-point field-producing rate reaches 100,000 STB of oil/day. (Run No. 24, with net gas sales of 4.0 MMMSCF/D after 2.75 years was terminated after 20 years because pressure became low in the gas cap. Oil rate after 20 years was 123,000 STB/D.) Figure 1 illustrates graphically the relative magnitude of oil recovery for each case listed in Table I. Detailed yearly

results of each run are listed in Tables II through XXX, with all numbers taken at year end. Figures 19 through 47 show oil, net gas and water production rate, and cumulative production for each phase versus time. Figures 48 through 76 show oil rate, water injection, GOR, WOR and oil zone pressure versus percent oil recovery. Basic conditions and results of each run are further described in Appendix A.

A summary analysis follows:

1. Oil recoveries at an end-point field-producing rate of 100 MSTB/D range from a low 6.05 MMMSTB to a high of 8.18 MMMSTB. These recoveries are equivalent to 31.6% and 42.8% of original stock tank oil in place (Run Nos. 24 and 10).

2. The highest oil recoveries were obtained under conditions of an aquifer supplemented by water injection and no gas sales (92% reinjected with the balance for field use). Recoveries ranged from 7.70 MMMSTB (at a maximum sustained oil rate of 1.8 MMSTB/D) to 8.18 MMMSTB (at a maximum sustained oil rate of 1.2 MMSTB/D). These recoveries were obtained after 17.25 years to 25.0 years (Run Nos. 10, 11 and 12).

3. These higher ranges of oil recoveries can be approached under conditions of 2.0 MMMSCF/D gas sales and water injection if certain operating limits are changed (as in Boundary Conditions, point 5). This is true at the higher oil-producing rates of 1.6 MMSTB/D, and 1.8 MMSTB/D, where recoveries were 7.84 MMMSTB and 7.80 MMMSTB after 27.5 years and 26.25 years, respectively (Run Nos. 21 and 22).

4. Increasing gas sales above 2 MMMSCF/D for a given maximum sustained oil rate (1.6 MMSTB/D) resulted in successively reduced oil recoveries. This is true for all cases compared, as shown in Fig. 2.

5. Delaying gas sales from 2.75 years to 6.75 years had very little effect on oil recovery in the higher oil rate cases (1.6 MMSTB/D and 1.8 MMSTB/D), when the gas sales rate was 2.0 MMMSCF/D (Run Nos. 21, 22, 26 and 27). In the case of lower oil rates or higher gas sales rates, however, delay of gas sales resulted in improved oil recoveries.

   a. With gas sales of 2.0 MMMSCF/D and maximum oil rate of 1.2 MMSTB/D, oil recovery was increased from 7.35 MMMSTB to 7.85 MMMSTB, or by 6.8% (Run Nos. 20 and 25).

   b. With gas sales of 3.0 MMMSCF/D and maximum oil rate of 1.6 MMSTB/D, oil recovery was increased from 7.02 MMMSTB to 7.45 MMMSTB, or by 6.1% (Run Nos. 23 and 28).

   c. With gas sales of 4.0 MMMSCF/D and maximum oil rate of 1.6 MMSTB/D, oil recovery was increased from 6.05 MMMSTB to 7.06 MMMSTB, or by 16.0% (Run Nos. 24 and 29).

6. The lowest recoveries resulted under a combination of depletion gas cap expansion drive (no aquifer or water injection) and partial gas sales. Recoveries in this category ranged from 6.10 MMMSTB to 6.44 MMMSTB, produced within 18.25 to 19.75 years (Run Nos. 4, 5 and 6).

7. Recovery is essentially independent of oil-producing rate (within the range of 1.2 MMSTB/D to 1.8 MMSTB/D) under conditions of no gas sales and no water injection, either with or without an aquifer (Run Nos. 1, 2, 3, 7, 8 and 9).

8. Gas recoveries ranged up to 30.182 MMMMSCF or 72.33% of original total gas in place. This was for the highest gas sales rate case of 4.0 MMMSCF/D after 2.75 years (Run No. 24).

Qualifications

The numbers in this report should be considered relative rather than absolute. Reservoir performance predictions on a field without production history are approximate at best. Absolute values should be used with caution, but relative values can be used to compare production schedules with confidence.

The final recoveries of both oil and gas are influenced by the operational conditions assumed and the data imput to the model. The model data was based on volumetric studies,[1] independent aquifer response,[2] gas coning,[2] gravity drainage studies,[2] and residual oil saturations from cores. Separate sensitivity studies[2] show that aquifer response will probably be moderate to non-existent. Early production and pressure history should be monitored carefully to determine the effectiveness of a water drive.

Coning studies[2] have shown that early gas breakthrough could occur. However, the extent of impermeable barriers, production rate, and distance of perforations from the gas-oil contact greatly affects this behavior.

The results of the present study are designed to show the overall effect of fluid withdrawals on gross reservoir behavior. Detailed results based on the available data would be presumptuous in the absence of some production history.

1. Ibid, p. 1.
2. Ibid, p. 1.

Recovery of liquids from the gas cap was not considered in the model predictions. While the inclusion of gas cap liquids would provide a relative improvement to total liquid recoveries in the gas sales cases, this improvement would not be of sufficient magnitude to change the basic conclusions stated earlier. It should be recognized also that substantial gas and associated liquid recovery can be expected for the no-gas sales cases when the gas cap is finally blown down.

The prediction runs made in this study generally indicate slightly higher oil recoveries for the no-gas sales cases compared to the gas sales cases. For example, the maximum recovery for no-gas sales compared to gas sales in 2.75 years after start of production shows a difference of 0.350 MMMSTB or 4.3% (Run Nos. 10 and 21). However, it should be recognized that there are several important factors that work to reduce the net effect of this increased oil recovery which have not been determined in this study:

1. Actual gas required to fuel the turbine-driven compressors over the operating life of the field. High volumes will need to be recycled in the absence of partial gas sales.

2. The cost of additional compression equipment for reinjection over that required for gas sales compression.

3. Additional operating costs of the compression equipment over the field life.

Recommendations

1. The results of this study indicate that with or without gas sales, water injection will be beneficial for increased oil recovery. Operators should be prepared to inject water within a very few years following startup of the Field.

2. In this study only peripheral water injection was considered. Detailed study should be made of pattern injection considering permeability variations.

3. Although the prediction runs made in this study indicate that early gas sales will generally result in reduced oil recoveries, it should be recognized that important economic factors were not included in any of the boundary conditions. Further study should be made to determine the overall impact of such factors as net liquid values from gas cap processing, and power requirements to recycle the high gas volumes in the absence of gas sales.

Reservoir Model

The reservoir model used for this study was a two-dimensional, cross-sectional, three-phase mathematical fluid-flow simulator. The cross section took into account the approximate pie-cut shape of the reservoir. The model used six layers, with each layer representing one-half of the Upper, Middle and Lower zone identified in Reference 1. Each layer was divided into twenty or twenty-one concentric cells, approximately one mile wide with the length dependent on the representative contour line. Figure 3 shows a perspective view of the cross section described, including the grid numbering system used.

In addition, a 12-layer model unit with 40 concentric cells was used. That model resulted in similar answers.

Input Data

Basic input to the model was derived from independent confidential studies of data furnished by the Operators and by the State of Alaska. These data are proprietary.

Each node in the cross-sectional grid was described with values for elevation, thickness, grid dimensions, poros-

ity, permeability, initial pressure, rock compressibility, initial saturation (each phase), relative permeability (each phase), oil-water capillary pressure, gas PVT factors, oil PVT factors and water PVT factors.

Data assigned to individual producing wells included productivity index, completion interval and initial producing rate schedule.

Volumetrics

Original oil in place was 19.1 MMMSTB, with solution gas of 13.9 MMMMSCF. Gas cap volume was set at 26.5 MMMMSCF instead of the 21.2 MMMMSCF quoted in Reference 1. The reason for this increase was because of additional well control in the gas cap, and the strong possibility that gas in the Shublik is in communication with the Sadlerochit.

Rock Properties

The basic approach used to establish rock property correlations was to analyze all core and log data available, identify maximum and minimum limits and select the best average relationships.

Relative Permeability

Relative permeability relationships were developed through a normalization and curve fitting procedure.

Relative permeability to oil curves were described for two major regions, (1) near the gas-oil contact, and (2) near the water-oil contact (Figs. 4 and 5). Single gas and water relative permeability curves were applied throughout the model (Figs. 6 and 7).

Average connate water saturation used was 19.0%, based primarily on log interpretation.

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Residual oil saturations used were 23.0% in the presence of only water, and 32.0% in the presence of connate water and gas. These values were based on core analyses.

Critical gas saturation was estimated to be 3.0%.

It should be emphasized that these endpoint saturations are greatly influential in final oil recovery values obtained under any operating conditions.

Capillary Pressure

Capillary pressure data were analyzed from core data and derived from log analyses. The oil-water curve used in this model was that derived from log analyses (Fig. 8).

Absolute Permeability

Horizontal permeability used was basically 200 md, as determined from core analyses and numerous flow tests. Vertical permeability was 20 md. In layers 2, 3 and 4, horizontal permeabilities were increased by factors of 3 or 5. These values were based on evaluation of core analyses, overall shale break studies and well tests.

Rock Compressibility

Average formation compressibility was calculated from porosity compaction tests. The value used was 3.4×10^{-6} psi^{-1}.

Temperature

In this study, reservoir temperature at a given depth is assumed to be constant areally. Temperature dependent data were corrected to depth in accord with the gradient curve shown in Fig. 9 (Reference 1).

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Pressure

All available bottom-hole pressure data were analyzed and a pressure gradient curve developed as shown in Fig. 10. This relationship assumes a pressure gradient of 0.31 psi/foot in the initial oil column and is valid between the gas-oil and water-oil contact (Reference 1).

Oil PVT Data

The basic procedure used to develop oil PVT relationships was to critically analyze all fluid sample data available, compare reported fluid property results with published data and develop temperature- and pressure-corrected correlations relating fluid property behavior to depth.

Formation volume factor, solution gas-oil ratio and viscosity values as a function of pressure were developed for six depth intervals between the gas-oil contact and water-oil contact. These are shown as Figs. 11 through 16.

Gas PVT Data

A similar procedure was used to analyze all gas sample data and develop gas property relationships required.

Gas formation volume factors were calculated from reservoir pressure, reservoir temperature and applicable supercompressibility factors.

Gas composition in the gas zone was assumed to remain constant throughout the isothermal pressure reduction process.

Gas viscosity data were found to be in good agreement with published empirical correlations based on gas gravity and reservoir temperature. These correlations were, therefore, used to determine gas viscosity values. Gas PVT data used in the model are shown in Fig. 17.

Water PVT Data

Water properties were based on published correlations, based on the following parameters:

Salinity	19,125 ppm
Pressure Range	0—5,000 psig
Temperature	210° F

Water viscosity was assumed constant at 0.32 cp. Formation volume factor versus pressure is shown in Fig. 18.

Operating Conditions

It was assumed that sufficient wells would be available to maintain desired rates. A well completion in a given layer in the oil zone represents a group of wells uniformly draining the reservoir within that contour interval. Initial completion was in 80% of a layer, with two recompletions automatically made prior to shutin when GOR and WOR limits were exceeded. Withdrawals were based on volumetrics to assure uniform drainage of the reservoir. Withdrawal rates were made generally proportional to the oil volume for each cell.

Normally the gas-oil ratio was not allowed to exceed 15,000 SCF/STB, except in special cases where the limit was relaxed to 25,000 SCF/STB after 13 years. This was done for prediction Run Nos. 20 through 29. Another change made in this same group of runs was to drill 2 new well groups near the gas-oil contact after 14.75 years to prevent oil loss into the gas cap. These locations were based on high oil saturation values remaining at these nodes.

Water-oil ratio was limited to 3 for all cases throughout the study. Aquifer response was judged to be moderate to

non-existent, based on results of a previous coarse-grid, two-dimensional model study.[2]

Water injection was started after 4.75 years and maintained throughout the field life in Run Nos. 10, 11, 12 and 16 through 29. Injection rates were at 125% of the maximum sustained oil-producing rate and held constant thereafter. The injection location was placed near the water-oil contact.

Produced gas was reinjected into the gas cap from the start of producing operations for all cases. Injection volumes in the no-gas sales cases were assumed to be 92% of produced gas, with the remaining 8% assigned to field use. In those cases with gas sales, the injection volume was that remaining after subtracting 100 MMSCF/D for field use, and 12% for CO_2 removal.

2. Ibid, p. 1.

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APPENDIX B
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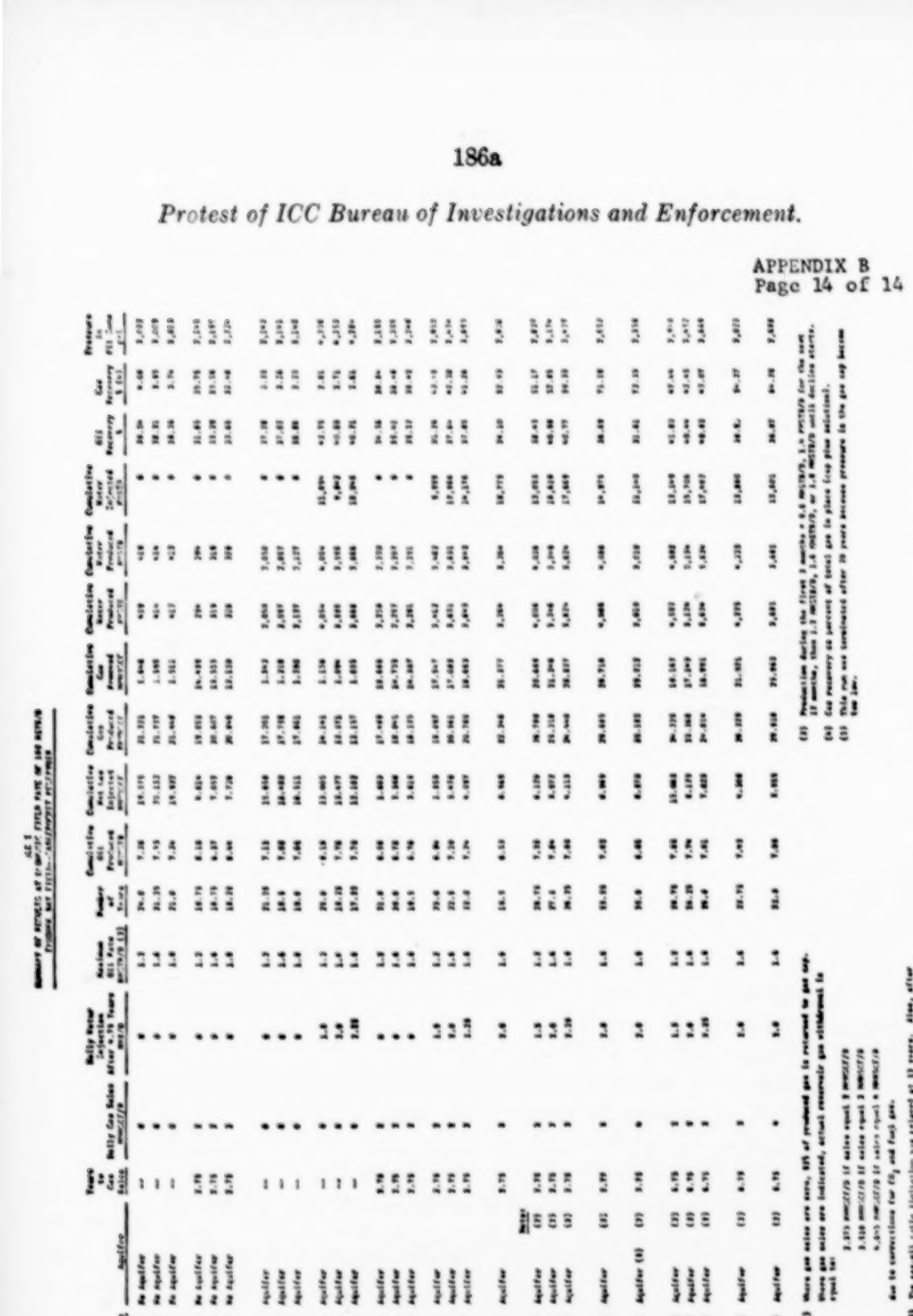

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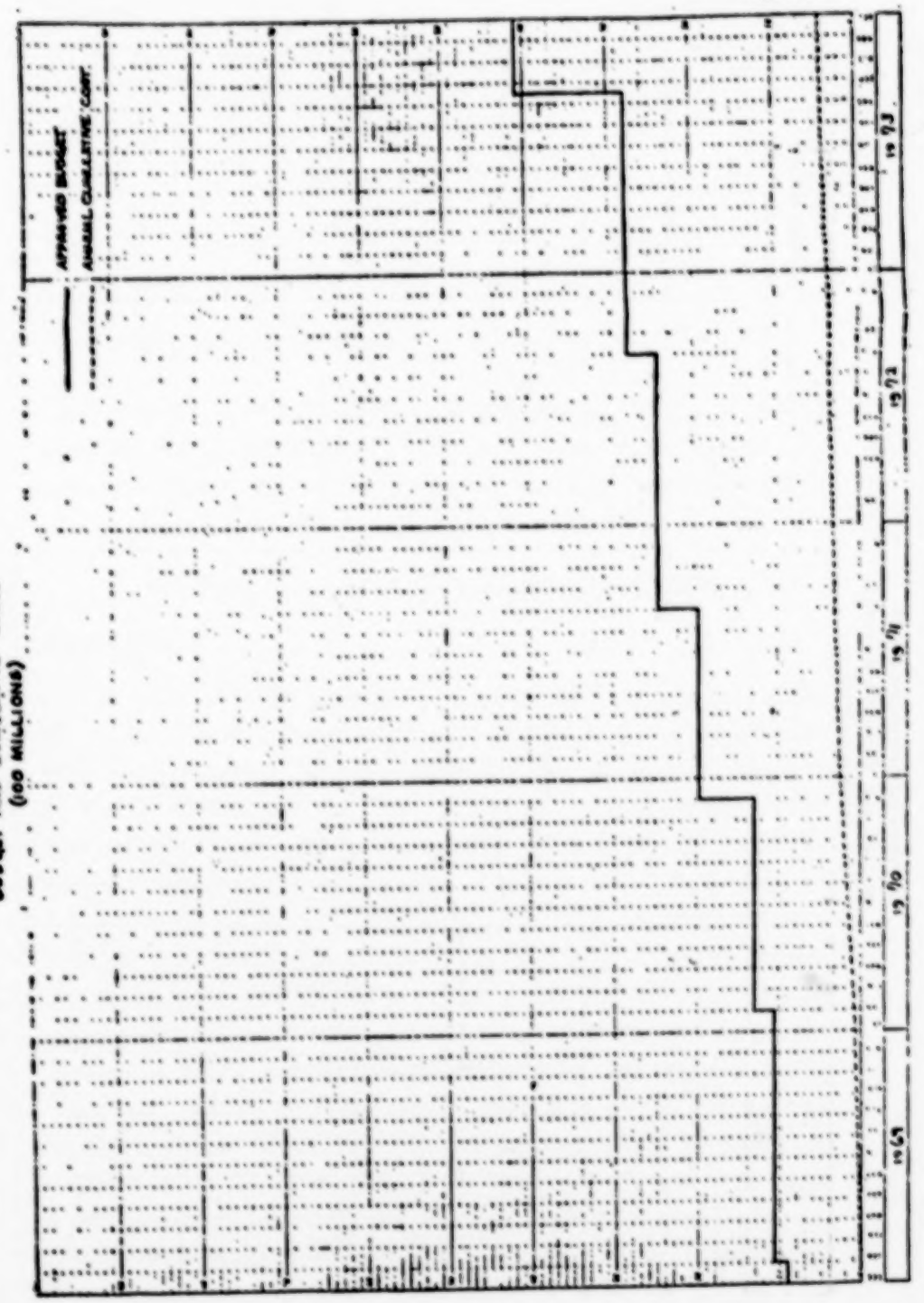
APPENDIX C
Page 1 of 2



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APPENDIX C
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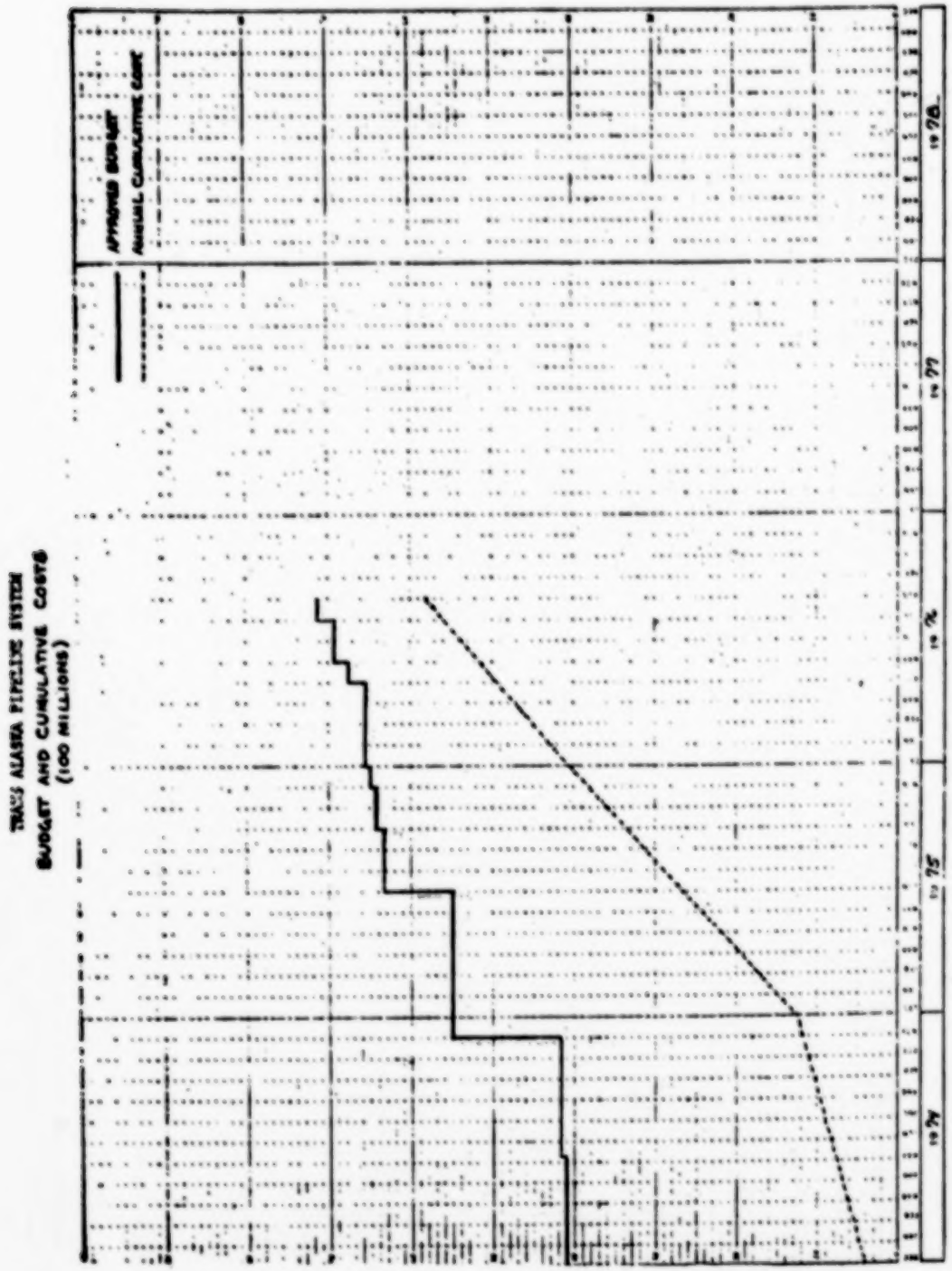

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APPENDIX E

THE DETERMINATION OF EQUITABLE PRICING LEVELS FOR NORTH SLOPE ALASKAN CRUDE OIL

NOVEMBER 1976

Prepared for Office of Regulatory Programs

FEDERAL ENERGY ADMINISTRATION

under Contract No. CR-06-60824-00

This report was prepared under contract to the Federal Energy Administration (FEA) and does not necesssarily state or reflect the views, opinions, or policies of the FEA or the Federal Government.

TRANS ALASKA PIPELINE SYSTEM

Basic Facts

The trans-Alaska pipeline is just over 801 miles in length, of which about 375 miles will be buried and the remainder will be elevated. Current plans call for an initial capacity of 600 MB/D when the line is first completed in mid-1977, increasing to an ultimate capacity of 2 MMB/D in three stages. In the first stage, line capacity will be boosted to 1.2 MMB/D by late '77 or early '78. The capacity will be further boosted to 1.5 MMB/D in '79. Boosting the capacity further to 2 MMB/D must be coordinated with the development of speculative reserves (see Field Development Plans). Some estimates indicate that the pipeline via "looping", which employs added pipe and pump stations at various points along the line where the grade requires it, could handle 2.5 MMB/D. The Valdez terminal will have a ship-loading capacity of 80 to 110 MB/H, and can accommodate tankers of 195 MDWT. For a line capacity of

1.2 MMB/D, the storage capacity will be met through 18 tanks with 510 MB capacity each. Four berths will be required for the 1.2 MMB/D throughput, with a fifth berth to be added upon the increase in line capacity.

TRANS ALASKA PIPELINE OWNERSHIP

Company	% of line owned
SOHIO Pipe Line Company	33.34
BP Pipelines, Inc.	15.84
ARCO Pipeline Company	21.00
Exxon Pipeline Company	20.00
Mobil Alaska Pipeline Company	5.00
Union Alaska Pipeline Company	1.66
Phillips Petroleum Company	1.66
Amerada Hess Corporation	1.50

TAPS AGREEMENT

Duration of initial team: 30 years

Form of ownership: undivided joint interest

Transfer of ownership:

—permissible for cash

—partners have first purchase rights

Expansion from 1.2 MMB/D to 2.0 MMB/D

—any participant may propose

—other participants may acquire proportionate share or decline

—each partner has option to acquire share for 2 years after expansion

Construction Costs

The estimated costs of pipeline construction for 1.2 MMB/D design capacity is 7.7 billion dollars. This estimate includes the construction costs for the Valdez terminal, the fuel line, pump stations, and pumping plants. The estimated construction costs by year of expenditure and by cost item are shown in Tables IV-1 and IV-2.

Table IV-1

ESTIMATED CONSTRUCTION COSTS OF TRANS ALASKA PIPELINE SYSTEM BY YEAR OF EXPENDITURE (For 1.2 MMB/D Design Capacity)

Year	Expenditures MM$
1969	35
1970	180
1971	109
1972	49
1973	47
1974	857
1975	2,772
1976	2,698
1977	765
1978	188
Total	7,700

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TRANS ALASKA PIPELINE SYSTEM
CONSTRUCTION COSTS
(MM$)

	Estimated Costs for 1.2 MMB/D (Design Capacity)
1. Alyeska Corporate	940.0
2. Bechtel—General	127.0
3. Pipeline—General	696.1
4. Pipeline Sections	1,353.6
5. Fuel Line	26.1
6. Mainline Pipe & other Permanent Materials	753.1
7. Pipeline & Roads—General	1,696.3
8. Roads—General	20.2
9. Roads	114.0
10. Yukon River Crossing	20.6
11. Fluor	171.2
12. Stations and Terminal—General	.1
13. Stations—General	14.8
14. Pump Stations	618.3
15. Topping Plants	21.1
16. Gate Valves	30.1
17. Mainline Refrigeration	5.0
18. Terminal—General	354.4
19. Terminal	738.0
Total Estimated Construction Costs	$7,700.0

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DEFINITIONS OF COST ITEMS
in Table IV-2

1. Alyeska Corporate

Salaries, benefits, travel, and office operations of the Alyeska corporate staff. All Project taxes, consulting fees, engineering contracts, Federal and State inspection, ecology and earth restoration, and security services.

2. Bechtel—General

Salaries, benefits, travel, office operations, and fee of the Construction Management contractor at all locations.

3. Pipeline—General

Pipeline construction that will be distributed later to individual sections. Examples: double jointing, pipe coating and cleaning.

4. Pipeline Sections

Execution contractors' salaries, equipment, and fees. Expendable materials and equipment consumed.

5. Fuel Line

Execution contractor salaries, material, and fee to construct fuel supply line for Pump Stations 1 through 4.

6. Mainline Pipe, Valves, Fittings

48" pipe, mainline block valves and various large fittings, including freight.

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7. Pipeline & Roads—General

All construction equipment furnished to the contractors, cargo and personnel transportation to the camps, hauling of 48" pipe, barge and tug operations, warehousing, and all activities related to the camps, including construction, operations, maintenance and catering.

8. Roads—General

General construction activities of the Yukon to Prudhoe haul road that will be distributed later to the road segments.

9. Roads

Haul road execution contractors' labor, material, catering, fee, and equipment. Includes the Yukon to Prudhoe, Livengood, and Dayville roads.

10. Yukon River Crossing

South road approach to the Yukon bridge, and Alyeska's share of the bridge construction.

11. Fluor

Salaries, benefits, travel, office operations, and fee of the Construction Management contractor at all locations.

12. Stations and Terminal—General

Preliminary engineering, soil testing, and progress payments to suppliers for both the terminal and the pump stations that will be distributed later.

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13. Stations—General

Bulk material purchases of concrete, electrical material, piping, etc. Will be distributed later.

14. Pump Stations

Salaries for site preparation, temporary and permanent buildings, machinery and equipment. Includes pipe valves, fittings, electrical material, lighting, and instrumentation.

15. Topping Plants

Permanent buildings, distillation units, piping, electrical, insulation, machinery and equipment, excavation and civil work, structural steel. Salaries, freight, and field materials and supplies.

16. Gate Valves

Foundation and permanent buildings for control valve units, power generation buildings, equipment, and fuel storage tanks. Salaries, freight, and field material and supplies.

17. Mainline Refrigeration

Refrigeration units, compressors, sump tanks, and excavation and civil work. Salaries, freight, and field material and supplies.

18. Terminal—General

Temporary construction facilities, catering and living quarters, construction equipment, and bulk materials. Will be distributed later.

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19. Terminal

Field salaries and materials for construction of the ballast water treatment, power generation, vapor recovery, tankage, and dock facilities.

20. Communications

Construction communication system and permanent Backbone communication systems for operating pipeline. Remote valve radio towers and leased circuit costs.

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IV-a

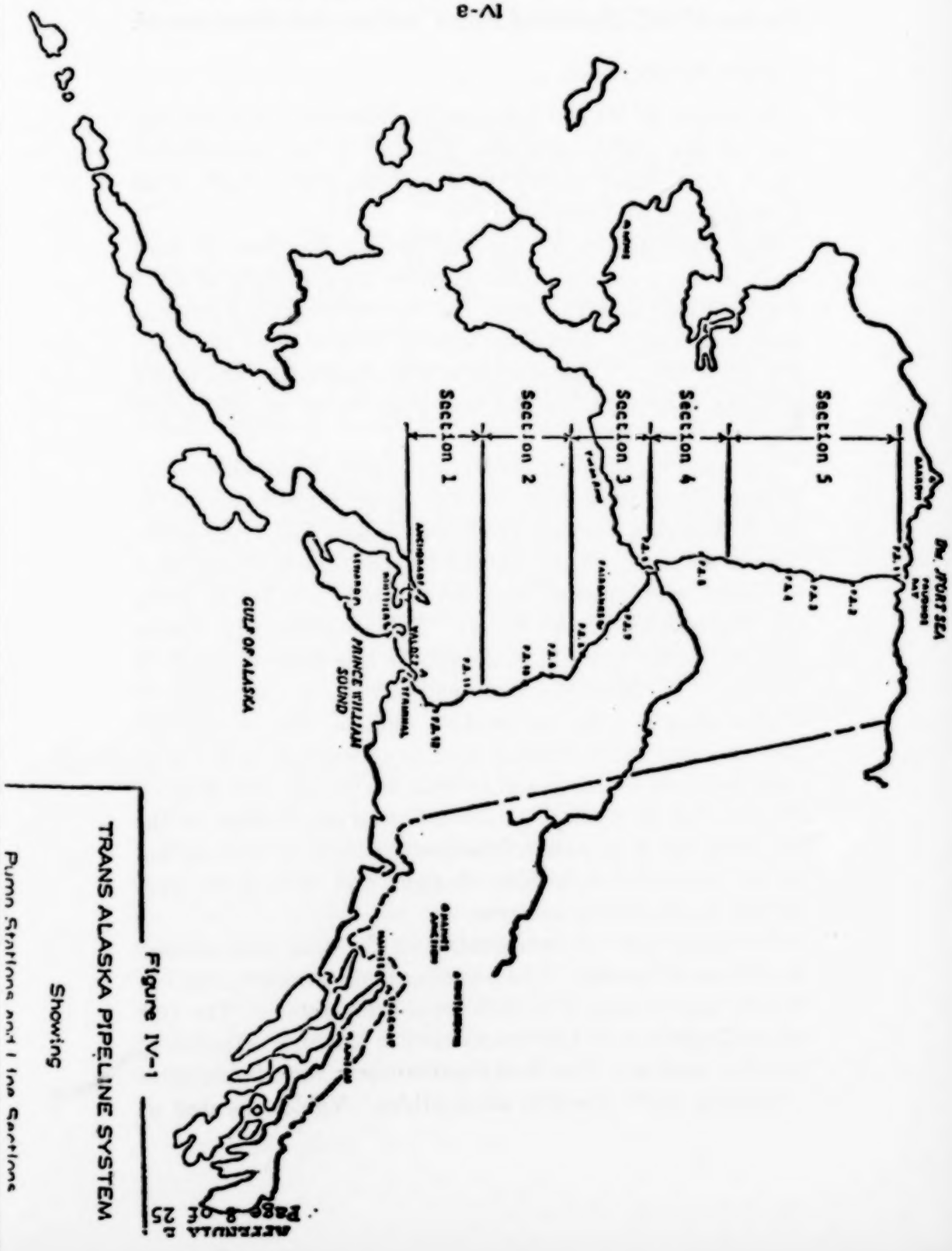

Figure IV-1

TRANS ALASKA PIPELINE SYSTEM

Showing

Pump Stations and Line Sections

System Description

A review of TAPS' construction history and a description of the major activities involved in the construction effort will further clarify the definitions and content of the 19 cost items of Table IV-2.

The trans-Alaska oil pipeline project has been in existence nearly a decade. Shortly after the discovery of oil at Prudhoe Bay in 1968, plans for the 800-mile long pipeline were announced. However, legal battles delayed construction until 1974. Construction of the pipeline system began officially with work on the haul road north of the Yukon River in April 1974.

The complex pipeline project encountered numerous challenges. It crosses some of the most rugged terrain in North America, varying from flood plains and river crossings to mountain passes. Prior to construction of the pipeline haul road, most of the area north of the Yukon River was inaccessible except by air. Soil conditions in Alaska have presented unusual challenges in line design. Much of the route is underlain with permafrost, or permanently frozen ground. In the coldest regions, the permafrost reaches close to the surface and is covered by a thin seasonal freeze-thaw layer and surface vegetation—the tundra. This serves as insulation to limit permafrost thaw in the summer, but it is easily damaged when it is in a melted state. Special construction designs and techniques were needed to protect these areas.

The possibility of earthquakes in the area was another design consideration. The pipeline, pump stations, and terminals were designed to withstand these forces. The risk of earthquakes was also considered in the final selection of pipeline location. The final pipeline route was chosen after evaluating eight possible alternatives. Valdez, located on

Prince William Sound, was chosen as the site for the southern terminus because it offered both an excellent port and because it would require the shortest pipeline. Port Valdez, both deep and wide, is protected from the open ocean and is ice-free the year round. It has plenty of space for tank farm erection and elevation of the tank farm will permit loading of ships by gravity flow.

From Prudhoe Bay south, the pipeline covers nearly 200 miles of marshy tundra until it reaches the Brooks Mountain Range. The line crosses over Dietrich Pass, approximately 4,800 ft. high, then continues down across the Interior. There it travels through 300 miles of permafrost, forest and glacial rivers. In the middle of those 300 miles, the line crosses the Yukon River at a point ½ mile wide. The pipe is mounted alongside the two-lane Yukon River bridge, the first permanent structure over the river. After crossing the Alaska Mountain Range, the pipeline continues on through Thompson Pass in the Chugach Mountains. This pass provided some of the most difficult areas of construction. The pipeline reaches Valdez 38 miles southwest of Thompson Pass.

Haul and Access Roads

The 360-mile long haul road, stretching north from the Yukon River to Surfcote at Prudhoe Bay, was completed in September 1974. This was the first major undertaking of the pipeline project and was necessary before any of the pipe could be laid. It made possible the first overland, all-weather route from the Yukon to Prudhoe. The 28-foot wide gravel road is being used during construction of the pipeline to transport workers, construction material, equipment and supplies to locations north of the Yukon.

A total of 28 million cu. yds. of gravel was used in the initial overlay, with an additional four million cu. yds. used to bring the road up to final grade conforming to State of Alaska secondary road requirements. An average of 110,000 cu. yds. of gravel was moved a day, making it possible to complete the road in five months. The 360-mile haul road cost 200 MM$.

In addition to the haul road, access roads are important in the transportation system. Fifteen permanent access roads link the main road with pump station sites and permanent airfields. All access roads to pump stations have a minimum 3-ft. gravel base on a two-lane roadway 28-ft. wide.

Airfields play a major part in the project's transportation scheme. Three permanent airfields were constructed, located near Prospect Creek Camp, Dietrich Camp, and Galbraith Camp. In addition, 8 temporary airfields were constructed.

Pipeline Construction Camps

31 construction camps are spaced along the pipeline route to house the work force involved in the construction process. The camps can be divided into three basic types: compact pump station camps housing about 250 workers; mainline construction camps, ranging in capacity from 300 to 1600 persons; and the Valdez Terminal Camp housing about 3,500 workers. The camps are of standardized modular construction, joined by covered walkways. A typical pipeline camp cost nearly 10MM$ to build; pump station camps cost from 6 to 7 MM$.

Pipeline Construction Modes

The pipe being used on the project was supplied by Japanese mills. It is 48″ in diameter with wall thicknesses

of .462″ and .562″. Different grades of pipe are used depending on the pressure and stress in each section.

Oil will leave the separation facilities at a maximum of 140°F. Due to heat generated by pumping and friction within the pipe, the oil will lose only some of that heat as it travels through the line. Because of the effect of heat on certain terrain and soil along the route, three construction modes have been developed for the various ground conditions. These modes are conventional burial, above ground, and special burial.

In conventional burial, the pipe is placed underground at depths ranging from three to twelve feet. This type of burial is being used on about 375 miles of line, in areas with stable soil, gravel or bedrock, or in areas where field exploration and analysis have shown that soil settlement or instability resulting from thawing would not damage the terrain or the pipeline.

The above ground mode or pipe installation is being used in areas where heat from the buried pipe would damage unstable permafrost. Installed on 423 miles of the pipeline, the above ground pipe is mounted on cross beams on vertical support members (VSMs)—18-inch pipes, spaced approximately 50 to 70 feet apart. The mounted pipe is fully insulated with four inches of resin-impregnated fiber glass covered with a galvanized steel jacket. The support assemblies and valves are covered with molded fiber glass and polyurethane foam. This insulation will prevent oil and pipe from chilling below the pour point during an extended shutdown.

Almost 80,000 VSMs are being used in construction of the line. Each one is placed in a pre-bored 24-inch hole and surrounded by a specified mixture of sand and water which expands when it is frozen, binding the pipes to the sur-

rounding ground. Approximately 70% of all the VSMs will have self-supporting heat pipes installed inside to keep the soil around the supports frozen. The heat pipes consist of sealed sections of pipe, containing anhydrous ammonia and topped by a finned radiator. The heat pipes are designed to operate when the temperature of the air is colder than the ground temperature. The ammonia absorbs heat from the soil, vaporizes, and rises; the heat is discharged into the air through the radiator. The ammonia vapor then condenses and returns to the bottom of the pipe where the cycle is repeated. The heat pipes will operate only in cold weather. In this way, the frozen condition of the permafrost will be maintained year round.

Above ground, the pipeline follows a zigzag configuration. This is because steel pipe expands when heated, and if the ends of the pipe are locked in place, the expansion forces set up stresses that bend the pipe. The zigzag pattern allows for expansion without stress by converting the tendency for lengthwise expansion to a sideways movement.

At several locations, special burial techniques for the pipeline were used. One technique utilizes 6-inch chilled coolant circulation pipes laid in the ditch bedding alongside the insulated pipe. The coolant pipes reduce heat transfer and provide heat removal to maintain the permafrost in a frozen state.

The pipeline route crosses more than 800 streams and rivers between Prudhoe Bay and Valdez. The two-lane Yukon River bridge was built to highway standards by the State of Alaska. The bridge, 2,300 ft. in length, is supported by five river piers. There are two suspension bridges at the Tanana and Tazlina Rivers, with free-spans of 1,200 ft. and 650 ft., respectively. All bridge designs provide for expansion due to thermal effects.

Pump Stations

For the initial throughput rate of .6 MMB/D, five pump stations will be required with one pump in each station. When the line capacity reaches 1.2 MMB/D, two pumps will be used in each of 8 stations. By the time the line reaches its capacity of 2 MMB/D, four additional stations will be required for a total of 12 stations with 3 pumps in each station. The pumps are multi-stage centrifugal pumps, driven by 13,500-hp. jet engine/power turbine drivers. Since the pipeline crosses three mountain ranges, the pump stations are spaced close together on the up-slopes and widely spaced on down-slopes. Natural gas from the Prudhoe Bay oil fields will be the fuel for pumps and power at Stations 1, 2, 3 and 4 north of the Brooks Range. 25 MMCF/D of gas will be required to fuel these stations for a throughput capacity of 1.2 MMB/D. Small refineries or topping units at Pump Stations 6, 8 and 10 will supply fuel for the remaining stations.

Communication Network and Control System

A communication network will link the stations with each other and with the Valdez Control Center via radio, microwave and earth satellite. The pipeline will be regulated by the Control Center at the terminal at Valdez. The control network will include a master station with computers at Valdez and 12 remote stations—one located at each of the pump stations. Data for over 100 variables describing operating conditions will be telemetered to the control center. Such items as condition of the valves, whether open or closed, power consumption and security information will be telemetered. The central computer will give a total update on every station at least every 10 seconds.

Valdez Terminal

The terminal facilities include tank farms, docks, tanker loading, ballast water treatment, power plant, vapor recovery system, and the pipeline control center. For the 1.2 MMB/D design capacity, 18 storage tanks will be required with 510 MMB capacity each. By the time the pipeline reaches its design capacity of 2 MMB/D, 32 storage tanks will be required.

A ballast treatment facility will receive the sea water ballast carried by the tankers in order to stabilize the vessels while they are without a cargo of oil. The ballast will remain in steel tanks for a minimum of six hours during which the oil will rise to the surface and be skimmed and pumped to the oil recovery section of the treatment plant and then back to the terminal's crude storage tanks. Five berths will be required when the throughput reaches 2 MMB/D. The berths are designed to handle tankers of 195 MDWT. The loading rate will be between 80 and 110 MB/H. Turn-around time, including docking, ballast discharge, loading oil, undocking, documentation and other port-related activities will take 36 hours.

Tariff Computation

The Prudhoe Bay Field development plans presented in this report identify three possible alternatives. Each alternative results in a different rate of production and throughput for the pipeline. Consequently, the computed tariff rates are different for each development plan. The tariffs were computed for each case for the years 1977-1994 according to the ICC and Justice Department guidelines as outlined in the Assumptions. After 1994, and due to the rapid decline in the field production rate, the computed

tariff would have to be increased sharply to yield to the owners 7% on the valuation of the pipeline. It was therefore assumed that by 1994, either new fields would have been discovered or the owners would accept less than the 7% allowed by the ICC. From 1995 on, the tariff was increased at 10¢/B annually. This assumption has little effect on the recommended crude price, since the rate of return is computed on the investment in the field and pipeline. The three cases for which the tariff was computed are summarized below.

Case I: Field development in this case is limited to Prudhoe Oil Pool. The field production rate was limited to 1.5 MMB/D and held at that rate through 1985, after which it begins to decline. The pipeline capacity was expanded in 1979 from 1.2 MMB/D to 1.5 MMB/D. The cost of the expansion was estimated at 520 MM$ plus 50 MM$ for construction interest. This brings the total estimated cost of the pipeline for 1.5 MMB/D capacity to 8,220 MM$ plus 1,350 MM$ for construction interest. The tariff for *Case I in 1976 dollars varies between 3.45 and 5.40 $/B.*

Case II: Field development in this case includes a lower estimate of the reserves of the Kuparuk and Lisburne Oil Pools. The rate of throughput for the pipeline increases to 1.77 MMB/D and is held through 1985, after which it begins to decline. It was necessary, therefore, to increase the pipeline capacity to the next level of 2 MMB/D. The estimated cost for increasing the pipeline capacity from 1.5 to 2.0 MMB/D is 500 MM$ plus 50 MM$ for construction interest. The total cost of the line is estimated to be 8,720 MM$ plus 1,400 MM$ for construction interest. The increase in throughput for this case outweighs the increase in cost required to increase the line capacity. Therefore, it

results in a lower tariff than in *Case I. The tariff for Case II in 1976 dollars varies between 3.10 and 5.60 $/B.*

Case III: The field development in this case includes the upper estimate of the reserves of the Kuparuk and Lisburne Oil Pools. The rate of throughput for the pipeline increases to 1.915 MMB/D and is held through 1985, after which it begins to decline. This case requires no additional investment in TAPS over Case II. However, *because of the increased rate of throughput the tariff in 1976 dollars varies between 2.90 and 5.60 $/B.*

TRANS ALASKA PIPELINE SYSTEM

ASSUMPTIONS FOR TARIFF COMPUTATION
(All Costs in Billion Dollars)

1.	Cost of construction for 1.2 MMB/D design capacity	= 7.70
2.	Construction interest for (1) above	= 1.30
3.	Cost of expansion to 1.5 MMB/D	= .52
4.	Construction interest for (3) above	= .05
5.	Operating costs	= .274 $/B
6.	State of Alaska corporate income tax	= 9.4 %
7.	State of Alaska ad valorem tax based on economic value of pipeline	= 2 %
8.	Debt to capital ratio	= .85
9.	Interest on debt	= 9.0 %/annum
10.	Debt is retired in equal installments over a 25-year period.	
11.	For rate determination, pipeline depreciation is normalized (i.e. straight line) over 26.5 years. Federal and state income taxes allowed in rate determination are based on normalized depreciation. [Reference: ICC Docket No. 35533; William Bros. Pipeline Co., October 10, 1975].	
12.	The ICC valuation base declines at 6% per annum.	
13.	The maximum profit permitted on the ICC valuation base is 7% per annum.	
14.	For actual federal income tax, the line is depreciated using double declining balance over 17.5 years.	
15.	Federal corporate income tax	=48 %
16.	Investment tax credit	=10 %

Table IV-3

TRANS ALASKA PIPELINE SYSTEM

COMPUTED TARIFF AND PIPELINE ECONOMICS

CASE I: LINE CAPACITY 1.8 MMB/D
(Field Development Limited to Prudhoe Oil Pool)

Year	Throughput MB/D	Throughput MMB/Y	Tariff ¢/B	Gross Revenue MM$	Operating Costs MM$	State Taxes Ad Valorem MM$	State Taxes Corporate MM$	Federal Income Tax MM$	Capital Investment MM$
1969									35
70									160
71									100
72									49
73									47
74									858
75									2772
76									2600
77	600	140	540	788	40	53			765
78	1200	438	540	2365	120	115	53		180
79	1400	511	485	2476	140	108	66		520
1980	1500	548	435	2384	150	102	73	184	
81	1500	548	415	2274	150	96	73	338	
82	1500	548	395	2165	150	90	73	337	
83	1500	548	380	2082	150	84	74	344	
84	1500	548	365	2000	150	78	75	347	
85	1500	548	345	1891	150	75	73	336	
86	1430	518	345	1791	142	70	72	334	
87	1305	476	360	1717	131	66	71	329	
88	1210	442	365	1613	121	62	70	322	
89	1110	405	360	1519	111	58	70	322	
1990	1004	367	365	1455	104	55	68	314	
91	912	345	395	1375	95	51	67	309	
92	870	318	410	1304	87	48	66	304	
93	801	292	420	1231	80	45	64	299	
94	792	287	430	1148	74	43	61	284	

Pre-1976 costs expressed in actual dollars (i.e., money of the day).
Post-1976 costs and revenues expressed in 1976 dollars.

Table IV-4

TRANS ALASKA PIPELINE SYSTEM

COMPUTED TARIFF AND PIPELINE ECONOMICS

CASE II: LINE CAPACITY 2.0 MMB/D
(Field Development Includes Lower Estimate of Kuparuk and Lisburne Pools)

Year	Throughput MB/D	Throughput MMB/Y	Tariff ¢/B	Gross Revenue MM$	Operating Costs MM$	State Taxes Ad Valorem MM$	State Taxes Corporate MM$	Federal Income Tax MM$	Capital Investr MM$
1969									35
70									160
71									109
72									49
73									47
74									858
75									2772
76									2600
77	600	146	560	818	40	53			765
78	1200	438	560	2453	120	115	58		708
79	1500	548	475	2603	150	122	73		500
1980	1600	584	430	2511	160	125	74	61	
81	1720	628	385	2418	172	117	77	357	
82	1760	642	360	2315	176	110	78	350	
83	1770	646	340	2200	176	104	77	354	
84	1770	646	325	2103	177	98	76	353	
85	1770	646	310	2006	177	92	76	350	
86	1655	604	315	1903	166	86	76	349	
87	1535	560	325	1823	154	81	75	345	
88	1435	524	330	1729	144	76	74	344	
89	1325	484	340	1621	133	72	74	341	
1990	1234	450	345	1556	123	67	72	334	
91	1142	417	350	1469	114	63	70	322	
92	1040	380	365	1387	104	59	69	319	
93	956	349	375	1309	96	56	67	312	
94	872	318	385	1186	87	53	62	286	

Pre-1976 costs expressed in actual dollars (i.e., money of the day).
Post-1976 costs and revenues expressed in 1976 dollars.

Protest of ICC Bureau of Investigations and Enforcement.

Table IV-5

TRANS ALASKA PIPELINE SYSTEM

COMPUTED TARIFF AND PIPELINE ECONOMICS

CASE III: LINE CAPACITY 2.0 MMB/D

(Field Development Includes Upper Estimate of Kuparuk and Lisburne Pools)

Year	Throughput MB/D	Throughput MMB/Y	Tariff 4/B	Gross Revenue MM$	Operating Costs MM$	State Taxes Ad Valorem MM$	State Taxes Corporate MM$	Federal Income Tax MM$	Capital Investment MM$
1969									35
70									160
71									109
72									49
73									47
74									153
75									2772
76									2693
77	800	146	500	818	40	53	55	61	765
78	1200	438	500	2453	120	115	73	356	108
79	1500	548	475	2603	156	122	74	352	500
1980	1600	584	450	2511	173	125	77	353	
81	1794	655	370	2424	179	117	76	361	
82	1859	679	340	2309	186	110	76	354	
83	1850	679	325	2207	188	104	78	350	
84	1915	699	305	2135	192	98	78	341	
85	1915	699	290	2030	193	92	76	336	
86	1850	657	280	1941	180	86	74	334	
87	1677	612	300	1839	168	81	73	331	
88	1574	575	300	1725	157	76	73	322	
89	1458	532	310	1652	146	72	72	312	
1990	1357	495	315	1562	136	67	70	306	
91	1250	460	320	1472	125	63	67	305	
92	1145	418	330	1379	114	59	66		
93	1052	384	340	1306	105	56	63		
94	958	350	355	1243	98	53	60		

Pre-1976 costs expressed in actual dollars (i.e., money of the day).
Post-1976 costs and revenues expressed in 1976 dollars.

Protest of ICC Bureau of Investigations and Enforcement.

Some Comments on Tariff Computation

Gross Revenue = throughput × tariff.

Operating Costs are based on the estimated manpower required to operate and maintain the line. Alyeska and TAPS owners are still in the process of developing an operating budget for TAPS and could not confirm or infirm our estimate.

State Corporate Income Tax = .094 of taxable income from the pipeline. Discussions with Alaska Department of Revenue indicate that the State of Alaska applies allocation and apportionment in multi-state taxation. The application of multi-state taxation would require estimating total corporate income by pipeline owner from all activities and allocating it back to each activity based on certain allocation formulas. This approach could not be followed here because it would be unrealistic to estimate the future corporate income of each TAPS owner for the entire life of the project.

Tables IV-3, IV-4, and IV-5 present the computation of the tariff, gross revenue, operating costs, State of Alaska ad valorem and corporate income taxes, federal income tax and capital investment. These results were merged with the results of calculations from Prudhoe Bay and used to calculate a rate of return on the investment in the field and pipeline.

A communication received from a North Slope owner shortly before going to print estimates the operating costs at 25¢/B higher than our estimate. Since TAPS' operating costs are passed in toto to the tariff, and since this change increases the real rate of return on the investments in TAPS and the field by 6 basis points only, it was possible to

account for this change without repeating the entire computation and analysis.

Average Tariff for First 10 Years of Pipeline Operation

	$/B
Case I	4.50
Case II	4.30
Case III	4.20

Effects of Inflation on Pipeline Tariff

Inflation impacts the tariff in three ways:

— The valuation base at any given time is affected by the rate of inflation, which determines the replacement cost of the line.

— The interest charges on the debt are also affected by the rate of inflation. Portions of the debt will be refinanced at maturity at interest rates which depend on the rate of inflation.

— The future operating costs of the line will also depend on the rate of inflation and will directly impact the tariff.

Pipeline Tariffs in 1987 at 7% Inflation

	$/B
Case I	4.80
Case II	4.35
Case III	4.05

"RECOMMENDATION OF THE FEDERAL POWER COMMISSION TO THE PRESIDENT-
ALASKA NATURAL GAS TRANSPORTATION SYSTEMS - MAY 1, 1977"

APPENDIX XII-A

PROFITABILITY AND FINANCIAL STRUCTURE OF INTEGRATED PETROLEUM COMPANIES 1/

($ Millions)

COLUMN 1 Year	COLUMN 2 Net Income After Tax 2/	COLUMN 3 Net Worth 2/	COLUMN 4 After-Tax Return on Equity (%) (Col. 2÷Col. 3)	COLUMN 5 Long-Term Debt	COLUMN 6 Total Capitalization (Col. 3+Col. 5)	COLUMN 7 Long-Term Debt to Total Capital Ratio (Col. 5÷Col. 6)
1966	5,732	52,859	10.8%	8,612	61,471	14.0%
1967	6,206	56,392	11.0	10,565	66,957	15.8
1968	6,752	59,999	10.9	13,187	73,186	18.0
1969	6,760	63,570	10.6	14,864	78,434	19.0
1970	6,701	66,885	10.0	16,756	83,641	20.0
1971	7,328	70,838	10.3	19,339	90,177	21.4
1972	6,898	72,514	9.5	20,283	92,797	21.9
1973	11,766	80,100	14.2	20,813	100,913	20.6
1974	16,558	92,446	17.9	23,092	115,538	20.0
1975	11,977	96,874	12.4	30,645	127,519	24.0
Average 1966-1975	N.A.	N.A.	11.8	N.A.	N.A.	N.A.
Average 1973-1975	N.A.	N.A.	14.8	N.A.	N.A.	N.A.

1/ Data from Chase Manhattan Bank financial statistics on a group of 28 petroleum companies. Data base changed to 29 companies in 1975.

2/ Includes minority interest.

VERIFIED STATEMENT OF DAVID L. JONES OF THE COMMISSION'S BUREAU OF ECONOMICS

IN EX PARTE NO. 308, VALUATION OF COMMON CARRIER PIPELINES

Table 6

Capitalization of U.S. oil pipeline companies, 1939-1975

(Dollars in millions)

As of December 31	Number of companies	Total capitalization	Capital stock	Capital stock as percent of total capitalization	Funded debt unmatured	Funded debt unmatured as percent of total capitalization
1939	57	$ 310.0	$273.3	88.2	$ 36.7	11.8
1940	55	294.3	264.2	89.6	30.5	10.4
1941	58	292.5	254.6	87.0	37.9	13.0
1942	54	301.2	255.1	84.7	46.1	15.3
1943	57	297.1	250.0	84.1	47.1	15.9
1944	57	282.6	243.4	86.1	39.2	13.9
1945	59	301.2	253.8	84.3	47.4	15.7
1946	58	297.8	240.1	80.6	57.7	19.4
1947	58	339.3	233.8	68.9	105.5	31.1
1948	59	439.2	235.4	53.6	203.8	46.4
1949	61	548.6	235.7	43.0	312.9	57.0
1950	63	660.3	236.1	35.8	424.2	64.2
1951	64	759.3	281.5	37.1	477.8	62.9
1952	62	1,023.5	290.6	28.4	732.9	71.6
1953	68	1,177.2	319.3	27.1	857.9	72.9
1954	72	1,265.6	325.7	25.7	939.9	74.3
1955	74	1,282.0	331.1	25.8	950.9	74.2

(Continued)

APPENDIX 2
Page 1 of 2

Table 6 continued

As of December 31	Number of companies	Total capitalization	Capital stock	Capital stock as percent of total capitalization	Funded debt unmatured	Funded debt unmatured as percent of total capitalization
1956	74	$1,304.5	$339.4	26.0	$ 965.1	74.0
1957	75	1,357.3	344.6	25.4	1,012.7	74.6
1958	78	1,383.6	351.7	25.4	1,031.9	74.6
1959	79	1,385.1	359.4	25.9	1,025.7	74.1
1960	82	1,439.3	383.8	26.7	1,055.5	73.3
1961	84	1,396.8	338.0	24.2	1,058.7	75.8
1962	87	1,383.5	340.4	24.6	1,043.1	75.4
1963	89	1,685.2	378.4	22.5	1,306.8	77.5
1964	85	1,620.2	380.5	23.5	1,239.7	76.5
1965	84	1,634.5	382.0	23.4	1,252.5	76.6
1966	82	1,789.9	388.4	21.7	1,401.5	78.3
1967	85	1,943.1	405.4	20.9	1,537.1	79.1
1968	92	2,129.6	431.5	20.3	1,698.1	79.7
1969	99	2,267.1	443.6	19.6	1,823.5	80.4
1970	101	2,517.4	449.8	17.9	2,067.6	82.1
1971	99	2,964.4	448.9	15.1	2,515.5	84.9
1972	99	3,183.7	428.2	13.4	2,755.5	86.6
1973	100	3,168.4	437.1	13.8	2,731.3	86.2
1974	103	4,093.4	450.8	11.0	3,642.6	89.0
1975	105	6,041.5	431.5	7.1	5,610.0	92.9

Source: *Petroleum Facts and Figures*, 1971 Edition, American Petroleum Institute, P. 535 (1939-1968) and Interstate Commerce Commission, *Transport Statistics in the United States*, Part 6, Bureau of Accounts.

APPENDIX 2
Page 2 of 2

Interstate Commerce Commission Order Instituting Investigation of Rules Tariffs Through Trans-Alaska Pipeline, June 17, 1977.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 17th day of June, 1977.

No. 36611

TRANS-ALASKA PIPELINE SYSTEM

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new rules and regulations affecting rates and charges, applicable on interstate or foreign commerce, in connection with the transportation of crude petroleum by pipeline from Prudhoe Bay, Alaska, to become effective June 20, 1977, and later designated as follows:

AMERADA HESS PIPELINE CORPORATION,
I.C.C. No. 1;
ARCO PIPE LINE COMPANY,
I.C.C. No. 1030,
on pages 2 through 13, ITEMS 1 through 17;
BP PIPELINES, INC.,
I.C.C. 1;
EXXON PIPELINE COMPANY,
I.C.C. No. 124;
MOBIL ALASKA PIPELINE COMPANY,
I.C.C. No. 1;
SOHIO PIPE LINE COMPANY,
I.C.C. No. 742,
on pages 3 through 13, ITEMS 5 through 110;
UNION ALASKA PIPELINE COMPANY,
I.C.C. No. 1;

or as same may be amended or reissued;

It further appearing, That upon consideration of the said tariff schedules and protests thereto, there is reason to

believe that the rules, regulations and provisions contained in such schedules may result in the application of rates and charges that are unjust and unreasonable and otherwise unlawful in violation of the Interstate Commerce Act;

And it further appearing, That the rates and charges affected by these rules and regulations will be considered by the Commission at a time subsequent to the service date of this order;

Wherefore:

It is ordered, That an investigation be, and it is hereby instituted into and concerning the lawfulness of the rules, regulations and provisions contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

And it is further ordered, That the carriers parties to the schedules named herein be, and they are hereby, made respondents to this proceeding; that copies of this order be served upon the said respondents; and that a notice of this proceeding be given to the public by posting a copy of this order in the Office of the Secretary of the Commission.

By the Commission. (Commissioners Murphy, Hardin, and Christian not participating).

H. G. Homme, Jr.
Acting Secretary

(SEAL)

Response of Sohio Pipeline Co. to June 2 Request.

[LETTERHEAD SOHIO PIPILINE COMPANY]

June 13, 1977

Interstate Commerce Commission
Constitution Avenue and 12th Street, N.W.
Washington, D. C. 20423

Gentlemen:

This responds to the Commission's "Request For Prompt Filing of Data Concerning Proposed Rate Levels" by the owners of the Trans-Alaska Pipeline System (TAPS). On June 3, 1977, Sohio Pipe Line Company filed with the Interstate Commerce Commission a tariff of $6.16 per barrel for the interstate movement of crude oil from Prudhoe Bay, Alaska, to the Valdez Terminal at Valdez, Alaska, via TAPS. This amount represents Sohio Pipe Line Company's best judgment as to a just and reasonable rate for its service at the present time and for the near term future after consideration by the Company's management of relevant factors now apparent governing this rate. We attach financial data so considered by the Company. These data will show, we believe, that the rate of earnings which Sohio Pipe Line Company estimates will be produced by its initial tariff will not exceed any lawful criterion of the reasonableness of such earnings.

Schedule I attached is a summary which reflects the estimated results of the operation of Sohio Pipe Line Company's tariff through 1982. This period of time embraces, in addition to the operations for the remainder of this year (which include, of course, costs associated with start-up), two full years of operation at the estimated initial capacity of the line, and three full years of operation at an assumed expanded capacity. The use of the five and a fraction year period does not necessarily indicate a determination by the Company either that no change in the tariff will be appropriate for such period of time or that such tariff will be changed at the end of such period. Factors that will be known only after commencement of actual operation of TAPS, such as its actual operating costs and throughput, may affect the rate level that is appropriate for Sohio Pipe Line Company's TAPS service from time to time.

We endeavored, in developing Schedule I and the data which underlie it, to reflect our understanding of the methods traditionally utilized in testing the effect and fairness of common carrier pipeline rates. Valuation was determined by what we understand to be the method normally used by the Commission in determining pipeline valuation. Depreciation is straight line and based on a 25 year life which is the estimated life of the field to be served by the pipeline. The interest expense is Sohio Pipe Line Company's actual interest expense. Income taxes are "normalized" by calculating such taxes as if the depreciation shown on the schedule were used for tax purposes. In addition, it does not reflect any reduction in taxes which may result from the use of the investment tax credit.

We include the following schedules which support or are relevant to an evaluation of Schedule I:

Schedule II: Projected TAPS Throughput Schedule
Schedule III: Debt Issues & Interest Expense
Schedule IV: Operating Expenses
Schedule V: Valuation
Schedule VI: Depreciation and Ad Valorem Tax

Sincerely,

J. T. BOLTACZ
Vice President, Sohio Pipe Line Company

JTB/LCT/skl
Attachments

SOHIO PIPE LINE COMPANY

TAPS TARIFF BASIS

	4 MONTHS 1977	1978	1979	1980	1981	1982	1983
TARIFF $/BARREL	$6.16	$6.16	$6.16	$6.16	$6.16	$6.16	$6.16
REVENUE	169.4	899.4	899.4	1161.8	1161.8	1161.8	1161.8
AD VALOREM TAXES	14.7	51.0	49.5	51.6	49.3	47.0	44.8
OPERATING EXPENSES	38.8	98.2	98.2	103.6	103.6	103.6	103.6
DEPRECIATION	41.5	126.2	126.8	136.8	136.8	136.8	136.8
INTEREST EXPENSE	84.4	252.5	250.2	261.9	248.8	235.0	209.4
TOTAL EXPENSES	179.4	527.9	524.7	553.9	538.5	522.4	494.6
STATUTORY INCOME TAXES	(5.3)	196.5	198.2	321.6	329.7	338.2	352.9
NET INCOME	(4.7)	175.0	176.5	286.3	293.6	301.2	314.3
RATE OF RETURN %	Neg.	5.3	5.4	8.3	8.7	9.1	9.7
VALUATION	3288.8	3315.0	3282.5	3444.1	3375.5	3308.3	3242.5
SHIPMENTS (MILLIONS)	27.5	146.0	146.0	188.6	188.6	188.6	188.6
NET INCOME	(4.7)	175.0	176.5	286.3	293.6	301.2	314.3
PERMISSIBLE EARNINGS @ 7%	76.7	232.1	229.8	241.1	236.3	231.6	227.0
EXCESS/(DEFICIT) EARNINGS	(76.7)	(57.1)	(53.3)	45.2	57.3	69.6	87.3
EXCESS EARNINGS ALLOCATED FOR CARRYBACK	0	0	0	45.2	57.3	53.1	0
CARRYBACK INCOME	45.2	57.1	53.3				
FROZEN EARNINGS/(LOST EARNINGS)	(31.5)	0	0	0	0	16.5	87.3
ACCUMULATIVE NET INCOME	40.5	272.6	502.4	743.5	979.8	1227.9	1542.2
ACCUMULATIVE RATE OF RETURN %	3.7	6.2	6.5	6.7	6.8	6.9	7.3

Response of Sohio to June 2 Request.

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SCHEDULE I

SOHIO PIPE LINE COMPANY

TAPS TARIFF BASIS

YEARLY SUMMARY
(MILLION OF DOLLARS)

	4 MONTHS 1977	1978	1979	1980	1981	1982
TARIFF $ PER BARREL	$6.16	$6.16	$6.16	$6.16	$6.16	$6.16
SHIPMENTS MILLIONS BARRELS PER YEAR	27.5	146.0	146.0	188.6	188.6	188.6
VALUATION	3288.8	3315.0	3282.5	3444.1	3375.5	3308.3
AD VALOREM TAXES	14.7	51.0	49.5	51.6	49.3	47.0
OPERATING EXPENSES	38.8	98.2	98.2	103.6	103.6	103.6
DEPRECIATION	41.5	126.2	126.8	136.8	136.8	136.8
INTEREST EXPENSE	84.4	252.5	250.2	261.9	248.8	235.0
TOTAL EXPENSES	179.4	527.9	524.7	553.9	538.5	522.4
STATUTORY INCOME TAXES	(5.3)	196.5	198.2	321.6	329.7	338.2
NET INCOME	(4.7)	175.0	176.5	286.3	293.6	301.2
ACCUMULATIVE RATE OF RETURN %	3.7	6.2	6.5	6.7	6.8	6.9

ACCUMULATIVE RATES OF RETURN SHOWN FOR 1977-1979 PERIOD REFLECT CARRYBACK INCOME FROM 1980-1982 PERIOD AS PROVIDED FOR UNDER THE TERMS OF THE 1941 ELKINS ACT CONSENT DECREE.

Response of Sohio to June 2 Request.

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SCHEDULE II

SOHIO PIPE LINE COMPANY

TAPS TARIFF BASIS

PROJECTED TAPS THROUGHPUT SCHEDULE (OIL + CONDENSATE)

	000'S BPD
SEPT. 1977	400
OCT. 1977	600
NOV. 1977	800
DEC. 1977	900
1978	1200
1979	1200
1980	1550
1981	1550
1982	1550

THE ABOVE SCHEDULE REPRESENTS SOHIO'S MOST OPTIMISTIC TAPS THROUGHPUT PROJECTION BASED ON THE FOLLOWING ASSUMPTIONS:

- INITIAL LIFTINGS FROM THE TAPS TERMINAL AT VALDEZ TO OCCUR BY SEPTEMBER 1, 1977, AND THE EXPANSION (PHASE III) OF TAPS TO 1,550,000 BARRELS PER DAY OPERATIONAL JANUARY 1, 1980.
- THROUGHPUT LEVELS FOR 1980 - 1982 PERIOD PREDICATED ON A MAXIMUM EFFICIENT RATE (MER) OF 1,500,000 BARRELS PER DAY PLUS CONDENSATE PRODUCTION OF 50,000 BARRELS PER DAY.

Response of Sohio to June 2 Request.

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SCHEDULE III

SOHIO PIPE LINE COMPANY

TAPS TARIFF BASIS

DEBT ISSUES & INTEREST EXPENSE
(MILLIONS OF DOLLARS)

			YEARLY INTEREST							
DEBT ISSUE	RATE	AMOUNT	PRIOR TO 1977	1/1/77-8/31/77	9/1/77-12/31/77	1978	1979	1980	1981	1982
REVOLVING CREDIT	8.925%	135.0			4.03	11.87	9.56	6.73	3.89	1.06
LONG TERM DEBT #1	9.75%	169.5			5.53	16.60	16.60	16.54	16.38	16.21
LONG TERM DEBT #2	8.625%	169.5			4.92	14.78	14.78	14.78	14.78	14.78
LONG TERM DEBT #3	10.625%	552.9			19.61	58.85	58.85	57.98	53.66	49.05
LONG TERM DEBT #4	10.625%	633.6			22.47	67.41	67.41	66.70	63.14	59.34
LONG TERM DEBT #5	8.75%	250.0			7.33	22.01	22.01	22.01	22.01	22.01
LONG TERM DEBT #6	9.75%	339.0			11.18	33.13	33.13	32.67	30.43	28.04
LONG TERM DEBT #7	6.00%	455.0			9.28	27.83	27.83	27.83	27.83	27.83
EXPANSION DEBT	9.5%	175.0			--	--	18.50	16.68	16.68	16.68
	9.3%	2879.5			84.35	252.48	268.67	261.92	248.80	235.01
TOTAL INTEREST CAPITALIZED			314.9	181.50			18.50			
TOTAL INTEREST EXPENSED					84.35	252.48	250.17	261.92	248.80	235.01

LONG TERM DEBT #7 REPRESENTS VALDEZ REVENUE BONDS.
EXPANSION DEBT IS AN ESTIMATE OF SOHIO'S BORROWED CAPITAL REQUIREMENT FOR TAPS PHASE III EXPANSION.
LONG TERM DEBT AND REVOLVING CREDIT GUARANTEED BY THE STANDARD OIL COMPANY.

Response of Sohio to June 2 Request.

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SCHEDULE IV

SOHIO PIPE LINE COMPANY

TAPS TARIFF BASIS

OPERATING EXPENSES
(MILLIONS OF DOLLARS)

	1977	1978	1979	1980	1981	1982
DIRECT OPERATING EXPENSES	$ 32.2	78.2	78.2	83.6	83.6	83.6
SOHIO CORPORATE SERVICES AND INSURANCE	1.6	5.0	5.0	5.0	5.0	5.0
RIGHT-OF-WAY EXPENSE	0.3	1.0	1.0	1.0	1.0	1.0
DISMANTLING AND RESTORATION EXPENSE	4.7	14.0	14.0	14.0	14.0	14.0
TOTAL	38.8	98.2	98.2	103.6	103.6	103.6

DIRECT OPERATING EXPENSES BASED UPON ALYESKA'S 1977 - 1976 PROJECTED COSTS. YEARLY ADJUSTMENTS HAVE BEEN MADE BY SOHIO FOR FUEL AND POWER CONSUMPTION AND COSTS. THE ABOVE OPERATING COSTS HAVE NOT BEEN ESCALATED FOR THE PERIOD 1979 - 1982 DUE TO BOTH THE UNCERTAINTY OF THE EXTENT OF FUTURE INFLATION AND THE LEVEL OF ACTUAL OPERATING COSTS FOR TAPS AFTER EXPANSION.

DISMANTLING AND RESTORATION EXPENSE ESTIMATED AT $1.05 BILLION (1977 $) BY ALYESKA AND HAS BEEN ACCRUED BY SOHIO AT ANNUAL RATE OF $14 MILLION PER YEAR.

Response of Sohio to June 2 Request.

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SCHEDULE V

SOHIO PIPE LINE COMPANY
TAPS TARIFF BASIS

VALUATION SCHEDULE
(MILLIONS OF DOLLARS)

	PRIOR TO 9/1/77	9/1/77 TO 12/31/77	1978	1979	1980	1981	1982
VALUATION BASIS							
CAPITAL EXPENDITURES							
TAPS - PHASE I/II	$2534.8	$48.1	$30.5	-	-	-	-
TAPS - PHASE III EXPANSION	-	-	-	$208.4	-	-	-
CAPITALIZED TAXES & OVERHEAD	59.2	-	-	-	-	-	-
CAPITALIZED INTEREST							
TAPS @ 1200 MBPD CAPACITY	496.4	-	-	-	-	-	-
TAPS PHASE III EXPANSION	-	-	-	18.5	-	-	-
TOTAL	3090.4	48.1	30.5	226.9	0	0	0
"GOING CONCERN" VALUE	3275.8	3302.0	3266.5	3428.1	3359.5	3292.3	3226.5
WORKING CAPITAL	13.0	13.0	16.0	16.0	16.0	16.0	16.0
VALUATION @ END OF PERIOD	3288.8	3315.0	3282.5	3444.1	3375.5	3308.3	3242.5
CAPITAL REQUIREMENT/SOURCE							
REQUIREMENT: CAPITALIZED		3138.5	30.5	226.9			
WORKING		13.0	3.0	0.0			
TOTAL		3151.5	33.5	226.9			
CAPITAL SOURCE							
BORROWED		2707.5	(8.2)	143.3			
EQUITY		444.0	41.7	83.6			
TOTAL		3151.5	33.5	226.9			

CAPITALIZED TAXES AND OVERHEAD INCLUDES AD VALOREM TAXES ($26.8) INCURRED PRIOR TO 1977 AND OVERHEAD ($3.0) PRIOR TO STARTUP.

TREATMENT OF VALUATION IN FUTURE YEARS WAS BASED UPON A TRADITIONAL 2% ANNUAL DECLINE RATE. WHILE THIS REPRESENTS A CONSERVATIVE HANDLING OF VALUATION IT WAS USED FOR PURPOSES OF THIS SCHEDULE BECAUSE OF THE UNKNOWN EXTENT OF FUTURE INFLATION.

Response of Sohio to June 2 Request.

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SCHEDULE VI

SOHIO PIPE LINE COMPANY

TAPS TARIFF BASIS

DEPRECIATION AND AD VALOREM TAX
(MILLIONS OF DOLLARS)

	1977	1978	1979	1980	1981	1982
DEPRECIATION BY CATEGORY						
CAPITAL EXPENDITURES	$ 34.12	$103.95	$104.58	$113.77	$113.77	$113.77
CAPITALIZED TAXES & OVERHEAD	0.79	2.37	2.37	2.37	2.37	2.37
CAPITALIZED INTEREST	6.62	19.86	19.86	20.68	20.68	20.68
TOTAL DEPRECIATION	$ 41.53	$126.18	$126.81	$136.82	$136.82	$136.82
AD VALOREM TAX						
PROPERTY, PLANT & EQUIPMENT (PRIOR YEAR END)	$2202.9	$2548.8	$2475.3	$2579.1	$2465.3	$2351.5
PLUS ADDITIONAL CAPITAL EXPENDITURES	380.0	30.5	208.4	-	-	-
LESS DEPRECIATION ON NET PROPERTY	34.1	104.0	104.6	113.8	113.8	113.8
NET PROPERTY (YEAR END)	2548.8	2475.3	2579.1	2465.3	2351.5	2237.7
AD VALOREM TAXES (EXPENSED)	14.7	51.0	49.5	51.6	49.3	47.0
AD VALOREM TAXES (CAPITALIZED)	29.4	-	-	-	-	-

DEPRECIATION BASED UPON 25 YEAR STRAIGHT LINE.

AD VALOREM TAXES BASED ON 2% OF PRIOR YEAR PROPERTY, PLANT, AND EQUIPMENT

Response of Sohio to June 2 Request.

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SECTION II

ALTERNATE CASE INFORMATION

1) Valuation Not Declined

2) Working Capital increased to $16.0 MM in 1980 vice 1979

**Response of Union Alaska Pipeline Co.
to June 2 Request, June 15, 1977.**

[LETTERHEAD OF UNION ALASKA PIPELINE COMPANY]

June 14, 1977

Interstate Commerce Commission
Washington, D.C. 20423

Gentlemen:

Pursuant to the Commission's notice dated June 2, 1977, please find attached the basis for the computation of the Union Alaska Pipeline Company tariff rate issued on June 15, 1977 and effective on June 30, 1977. The tariff and rate computations were prepared by Mr. L. F. Grandey, Vice President, Union Alaska Pipeline Company.

Very truly yours,

DAVID M. SCHWARTZ
SULLIVAN AND WORCESTER
1025 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036
(202) 293-6170
Attorney for Union Alaska
Pipeline Company

DMS:sky

cc: John M. Cleary, Esquire
Attorney for the State of Alaska

Response of Union Alaska to June 2 Request.

UNION ALASKA PIPELINE COMPANY
TARIFF CALCULATIONS
BASED ON THROUGHPUT AND EXPENSES
DURING THE PERIOD 9/1/77—12/31/77

1. Maximum Allowable 7% Consent Decree Net Income

		$
Construction cost $7,761.5 million × 0.0166	=	128,841,000
Capitalized start-up costs $245.9 million × 0.0166	=	4,082,000
Capitalized interest on financing thru 8/31/77	=	10,600,000
Capitalized supplies $40.0 million × 0.0166	=	664,000
Total		144,187,000
$144,187,000 × (0.07 × 122 days / 365 days)	=	$3,374,000

2. Interest Expense
(Medium and long-term notes @ 8.3% interest rate)
$83,125,000 × (0.083 × 120 days / 360 days) = 2,300,000
(Short-term paper @ 5.4% interest rate)
$45,314,000 × (0.054 × 120 days / 360 days) = 837,000
Total $3,137,000
(360 days in banking year—30 days/month)

3. Depreciation (25-year life)
$144,187,000 ÷ 25 years × 122 days / 365 days) = $1,928,000

4. Reserve For Restoration
$1,049,000,000 × 0.0166 ÷ 25 years × 122 days / 365 days) = $ 232,000

5. Operating Expense
Total $141,807,000 × 0.0166 = $2,354,000

$

6. Federal and State Income Tax
Federal 48.0%
State of Alaska 9.36%
Effective rate: (0.0936) + (0.48 − 0.0936 × 0.48) = 0.5287
$3,374,000 / (1-0.5287) (allowable net income) = $7,159,000 (income before tax)
Taxes: $7,159,000 $3,374,000 $3,785,000

7. Consolidation

Net Income	$3,374,000
Interest Expense	3,137,000
Depreciation Expense	1,928,000
Reserve For Restoration	232,000
Operating Expense	2,354,000
Income Taxes	3,785,000
Total	$14,810,000

8. Tariff
$14,810,000 ÷ 2,430,240 barrels (19,920 b/d) = $6.09/bbl.
(expected shipments)

Response of Union Alaska to June 2 Request.

UNION ALASKA PIPELINE COMPANY TAPS TARIFF ASSUMPTIONS

1977
(M$)

Assumption	Union Alaska Pipeline Company	Total Line	Source
1. Ownership	1.66%	100%	—
2. Start-up Date	9/1/77	9/1/77	Alyeska 5/19/77
3. Construction Cost(a)	128,841	7,761,500	Alyeska 5/19/77
4. Start-up Cost(a)	4,082	245,900	Alyeska 5/19/77
5. Maintenance Supplies(a)	664	40,000	Alyeska
6. Interest Expense to 8/31/77(a)	10,600	—	UA P/L Estimate
7. Depreciable Amount	144,187	—	Sum of 3, 4, 5, & 6
8. ICC 1977 Valuation	144,187	—	UA P/L Estimate
9. Operating Expense 1977(b)	2,354	141,807	Alyeska 5/19/77
10. Interest Rate 1977(b)	83,125 @ 8.3 %	—	UA P/L Estimate
	45,314 @ 5.45%	—	UA P/L Estimate
11. Restoration Reserve	1,741	1,049,000	Alyeska 5/19/77
12. Provision for Restoration(b)	232	14,020	1/25 per year
13. Income Tax Rates	Fed. 48%; Alaska 9.36%	—	UA P/L Estimate
14. Book Depreciation	25 year S/L	—	Expected ICC ruling
15. Line Capacity(b)	19,920 B/D	1,200,000 BD	—
16. Expected thruput(b)	19,920 B/D	—	UA P/L Estimate

(a) Capitalized
(b) 9/1/77-12/31/77

Response of BP Pipelines Inc. to Request for Tariff Data, June 17, 1977.

[Caption Omitted in Printing.]

RESPONSE OF BP PIPELINES INC.
TO ICC NOTICE DATED JUNE 2, 1977 TO
TRANS ALASKA PIPELINE SYSTEM OWNERS

BP Pipelines Inc. ("BP") issued its Local Pipeline Tariff 2 on June 3, 1977, effective June 20, 1977, later postponed with special permission of the Commission to June 30, 1977, applying to the interstate transportation of petroleum from Prudhoe Bay, Alaska to marine vessels at Valdez Terminal, Alaska with a tariff rate of $6.35 per barrel.

In its notice dated June 2, 1977, the ICC requested the basis of computation of the initial rate level. BP's tariff of $6.35 was not based solely on the computation of costs but was selected on the basis of a number of considerations. Among these were the overall risks and uncertainties of its participation in the project, including competition from other TAPS carriers, possible increases in operating costs and variations in throughput due to regulatory and marketing constraints (such as the availability of suitable tankers to handle the pipeline shipments over BP's space) and the physical capability of TAPS and the Prudhoe Bay production facilities to operate at all times under the hostile Arctic environment. BP also considered the need to provide adequate funds to cover its debt service requirements particularly for the early years. BP believes its interest costs are substantially higher than most of the other owner companies. In addition to normal operating costs associated with an oil pipeline's operation, BP also had to consider the need to provide funds for system dismantling and environmental restoration at the completion of the project.

In the following paragraphs the computations of each of BP's major cost elements are explained. Costs have been

estimated for three separate periods all starting from August 1, 1977, the estimated commencement of operations. The first extends to the end of 1977, the second through the first full calendar year of operation and the third through 1981. The later period assumes an expansion to 1.6 million barrels per day in January 1980. Following these explanations are estimates of the results of operations for these periods. Although, at the present time, BP cannot reasonably estimate its throughput volumes, it has assumed, for this presentation, full throughput for these periods except during the build-up to 1.2 million barrels per day over 1977.

The costs presented are the best estimates available at this time. BP recognizes that its tariff may need to be revised in the light of actual operation condition. This has been the experience of other large pipeline ventures.

Estimated Operating Expenses

Operating Expenses, excluding depreciation, are shown on Exhibit A for the three periods noted above and are comprised of BP's share (15.84%) of Alyeska's costs, and BP's direct costs. The Alyeska cost estimates for 1977 and 1977/1978 period are those presented to the TAPS owners on May 19, 1977 as Alyeska's preliminary operating budgets. For the remaining years of the 1977/1981 period BP projected operating costs reflecting changes in price levels and the effect of increased throughput in the later years. Presently, these estimated expenses do not include an allowance for the risk of liability for environmental damage.

Estimated Depreciation Expense

Depreciation Expense (see Exhibit B), is computed on a straight-line basis. The estimated service lives for the following Accounts are: 163, Communication Systems, 10 years; 164, Office Furniture and Equipment, 25 years; 165, Vehicles and Other Work Equipment, 5 years. Account 151, Land, is not depreciated. All other accounts are depreciated over an estimated economic life of 25 years for the entire project. The economic life is the estimated period over which the known recoverable reserves tributary to TAPS will be depleted to a point where further oil production and transportation will cease to be economically feasible.

The depreciation rates developed from the above lives were applied to the estimated original costs of Alyeska and BP. The cost of assembling and transporting the materials to be removed from the remote location of TAPS to a disposal point is expected to at least equal, and possibly exceed, the estimated amounts to be received from salvage sales. Therefore, the salvage credits are assumed to be zero.

Estimated Dismantling and Environmental Restoration Costs

In addition to the estimated costs normally classified in Accounts 300 to 580 (Operations, Maintenance and General Expenses), an accrual is also included for the estimated cost of dismantling the facilities and for environmental restoration. This work is required by the right-of-way agreements with the United States Department of Interior and the State of Alaska. An estimate of these costs, in 1977 dollars, has been prepared by independent contractors to Alyeska. BP's share of the total estimated cost is $166 million (see Exhibit C). The amounts shown on Exhibit C represent, for each period, the ratable portion (computed on a straight-line basis over 25 years) of this estimated cost

adjusted where appropriate for estimated price level changes.

Estimated Income Taxes

Estimated amounts for income taxes were calculated at the composite statutory Federal and State income tax rates. In computing the taxes, interest expense was deducted from the estimated net carrier operating income. The interest rates payable by BP vary from 1.18 times the prime lending rate of Morgan Guaranty Trust Company to 10⅝%. All of BP's borrowings are guaranteed by BP's parent, The British Petroleum Company Limited. The details of these borrowings and related interest were presented in BP's response of March 14, 1977 to Mr. J. R. Berman, Chief, Section of Audit.

Estimated Valuation

Whereas BP agrees with the principles employed in the ICC valuation process, it has expressed, in the Ex Parte 308 proceeding, its concern that the use of certain factors do not reflect current economic conditions. BP is hopeful that refinements of these factors will be adopted.

In computing its estimated valuation, BP has followed the current ICC procedures, in accordance with the instructions of Mr. William T. Bono in his letter dated April 22, 1977, and as detailed in the testimony of Mr. Jesse C. Oak, Senior Valuation Engineer, in Ex Parte 308 and has included the following:

(1) The cost of reproduction new was computed from the original costs by vintage year of expenditure.

(2) Working Capital was computed as 15 days' of estimated cash operating expenses plus an estimated balance of operating Materials and Supplies.

(3) The annual and period indices for the years 1976 through 1981 were projected from the 1975 indices (the latest available indices issued by ICC at the time of this calculation) assuming a continuation of increases in price levels.

The estimated valuation at December 31, 1977, $1,548 million (see Exhibits D, E, F and G), was derived from the combined estimated original costs of BP's share ($1,259 million) of the Alyeska total estimated project capitalized cost of $7,950 million, (see footnote on page 1 of Exhibit E) together with the Company-incurred capital costs (principally financing and overhead costs) of $204 million. The overhead amounts included in the cost of reproduction new and the cost of reproduction new less depreciation were derived using the following percentage factors:

Overheads	1½%	
Engineering Services	1½%	
Interest	11.75%	(6% annual rate for 23.5 months)

Similar calculations of cost of reproduction new were made for subsequent years.

BP's estimated original cost includes an allowance for interest on only the debt funds used during construction and not on the total funds employed. This was predicated on the assumption of the continuation of the current ICC valuation process.

Summary

Although the projected throughput volumes of BP are subject to a number of factors outside its control, BP, for this presentation, is showing the estimated operating

results under the optimistic assumption of full throughput except for the start-up period. No allowance has been made for shut-downs due to mechanical failures, lifting delays, or the inability of the system to deliver its nominal design capacity.

Based on a $6.35 tariff, the estimated operating results for the three periods may be summarized as follows ($million, unless otherwise indicated):

	1977	1977/1978	1977-1981
Volumes Delivered (million barrels)	20	89	334
Operating Revenues	127.0	565.2	2120.9
Operating Expenses:			
Depreciation	24.9	84.7	273.7
Dismantling & Restoration	2.8	10.0	35.5
Other Operating Expenses	27.6	92.4	307.5
Net Carrier Operating Income	71.7	378.1	1504.2
Interest Expense	47.9	166.8	488.9
Income Tax	12.6	111.8	537.0
Net Income	11.2	99.5	487.3
% Return on Valuation	1.7	4.5	7.0

From the above it can be seen that at a tariff rate of $6.35 per barrel, BP might just be able to cover its debt servicing requirement in 1977 although any reduction in BP's throughput would jeopardize this ability. Further, at the proposed tariff and with the throughput assumptions used, it would only be over the 1977-1981 period, taken as a whole, that BP would achieve a level of net income which BP believes to be commensurate both with the risks

involved and also with current practice. The alternative would have been to have filed a higher tariff in the initial period. BP considers it reasonable, though not without risk for BP, to spread the initial tariff over an extended period and thereby pass on to all shippers from the outset the benefit of the anticipated expansion. This approach also results in BP's initial shippers not having to bear all of the higher initial costs.

BP Pipelines Inc.
by D. A. Lucas
Manager of Transportation

Response of BP Pipelines to Request for Tariff Data.

BP PIPELINES INC.

EXHIBITS

TABLE OF CONTENTS

	EXHIBIT
Estimated Operating Expenses	A
Estimated Depreciation Expense	B
Provision for Estimated Dismantling and Environmental Restoration Costs	C
Estimated Valuation	D
Estimated Original Cost of Initial Project and Project Expansion	E
Estimated Cost of Reproduction New	F
Estimated Working Capital	G

Response of BP Pipelines to Request for Tariff Data.

EXHIBIT A

BP PIPELINES INC.

ESTIMATED OPERATING EXPENSES
FOR THE PERIODS BEGINNING AUGUST 1, 1977
AND ENDING DECEMBER 31, 1977, 1978 AND 1981,
($000)

LINE NO	DESCRIPTION (a)	DEPRECIATION EXPENSES (b)	DISMANTLING & ENVIRONMENTAL RESTORATION COSTS (c)	PIPELINE TAXES (d)	FUEL AND POWER (e)	ALL OTHER OPERATING EXPENSES (f)	TOTAL (g)
1	August 1 Through December 31, 1977						
2	BP Pipelines' Portion of Alyeska Costs	$ -	$ 2,769	$ 8,218	$ 1,629	$ 16,150	$ 28,766
3	BP Pipelines' Direct Costs	24,917	-	4	500	1,154	26,575
4	Total	$ 24,917	$ 2,769	$ 8,222	$ 2,129	$ 17,304	$ 55,341
5	August 1, 1977 Through December 31, 1978						
6	BP Pipelines' Portion of Alyeska Costs	$ -	$ 9,956	$ 34,416	$ 4,884	$ 46,509	$ 95,765
7	BP Pipelines' Direct Costs	84,711	-	112	2,235	4,256	91,314
8	Total	$ 84,711	$ 9,956	$ 34,528	$ 7,119	$ 50,765	$ 187,079
9	August 1, 1977 Through December 31, 1981						
10	BP Pipelines' Portion of Alyeska Costs	$ -	$ 35,493	$113,195	$ 16,294	$152,952	$ 317,934
11	BP Pipelines' Direct Costs	273,693	-	491	9,475	15,132	298,791
12	Total	$273,693	$ 35,493	$113,686	$ 25,769	$168,084	$ 616,725

Response of BP Pipelines to Request for Tariff Data.

BP PIPELINES INC.

ESTIMATED DEPRECIATION EXPENSE
FOR THE PERIODS BEGINNING AUGUST 1, 1977
AND ENDING DECEMBER 31, 1977, 1978 AND 1981
($000)

EXHIBIT B

Line No.	Account No.	Account Title	Estimated Depreciable Value December 31, 1977	Estimated Depreciable Value December 31, 1980	Depreciation Rate	Depreciation Expense August 1, 1977 Through December 31, 1977	1978	1981
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
1	152	Rights of Way	$ 165	$ 165	4%	$ 3	$ 9	$ 27
2	153	Line Pipe	31,308	31,308	4%	522	1,774	5,530
3	154	Line Pipe Fittings	6,909	6,909	4%	115	391	1,219
4	155	Pipeline Construction	1,025,262	1,025,262	4%	17,088	58,098	181,128
5	156	Buildings	42,228	42,228	4%	704	2,393	7,460
6	157	Boilers	2,192	2,192	4%	37	125	389
7	158	Pumping Equipment	13,987	22,000	4%	233	792	3,179 1/
8	160	Other Station Equipment	88,479	141,698	4%	1,475	5,014	20,361 1/
9	161	Oil Tanks	8,440	13,782	4%	141	479	1,967 1/
10	162	Delivery Facilities	232,672	274,298	4%	3,878	13,195	44,792 1/
11	163	Communications Systems	502	502	10%	21	71	221
12	164	Office Furniture & Equipment	167	167	4%	3	10	31
13	165	Vehicles & Other Work Equipment	8,365	8,365	20%	697	2,370	7,359
14		Total	$1,460,676	$1,569,076		$24,917	$84,711	$273,693

Notes: 1/ Includes Depreciation of Expansion Facilities over 22 years, 7 months remaining life (4.428%).

EXHIBIT C

BP PIPELINES INC.

PROVISION FOR ESTIMATED DISMANTLING
AND ENVIRONMENTAL RESTORATION COSTS
FOR THE PERIODS BEGINNING AUGUST 1, 1977
AND ENDING DECEMBER 31, 1977, 1978 AND 1981
($000)

Line No.	Description	Alyeska Costs 100%	BP Pipelines' Share 15.84%
	(a)	(b)[1]	(c)[1]
1	Displace, Clean and Purge	$ 90,000	$ 14,256
2	Pipeline and Pump Stations	564,000	89,338
3	Terminal	245,000	38,808
4	Alyeska Corporate Administration	150,000	23,760
5	Total	$1,049,000	$166,162
6	Accrual of Cost:[2]		
7	August 1, 1977 through December 31, 1977		$ 2,769
8	August 1, 1977 through December 31, 1978		$ 9,956
9	August 1, 1977 through December 31, 1981		$ 35,493

NOTES:

1. In 1977 Dollars.
2. Based on 25 Year Total Accrual Period, with Amounts After 1977 Adjusted for Expected Changes in Price levels.

Response of BP Pipelines to Request for Tariff Data.

BP PIPELINES INC. EXHIBIT D

ESTIMATED VALUATION
AT DECEMBER 31, 1977
($000)

Line No.	Description	December 31, 1977
	(a)	(b)
1	Original Cost[1]	$1,460,511
2	Cost of Reproduction New[1]	1,439,361
3	Total	$2,899,872
4	Cost of Reproduction New, Less Depreciation[1]	$1,439,361
5	Ratio of Line 1 to Line 3	50.3647%
6	Ratio of Line 2 to Line 3	49.6353%
7	Product of Line 1 x Line 5	735,582
8	Product of Line 2 x Line 6	714,431
9	Total (Line 7 + Line 8)	$1,450,013
10	Condition Percent (Line 4 ÷ Line 2)	100%
11	Value of Depreciable Property (Line 9 x Line 10)	1,450,013
12	Present Value of Land (Original Cost x 50%)	1,247
13	Present Value of Rights of Way (Original Cost x 50%)	83
14	Working Capital	9,321
15	Total Tangible Value (Lines 11 + 12 + 13 + 14)	1,460,664
16	Going Concern and Other Intangibles (Line 11 x 6%)	87,001
17	Final Value of Property Owned & Used	1,547,665
18	Less Property Constructed with Excess Earnings	—
19	Total Estimated Valuation	$1,547,665

NOTE:
1. Excluding Land & Rights of Way.

Response of BP Pipelines to Request for Tariff Data.

EXHIBIT E
PAGE 1 OF 2

BP PIPELINES INC.

ESTIMATED ORIGINAL COST OF INITIAL PROJECT
AT DECEMBER 31, 1977
($000)

Line No.	Account No.	Title	December 31, 1977
	(a)	(b)	(c)
1	151	Land	$ 2,494
2	152	Rights of Way	165
3	153	Line Pipe	31,308
4	154	Line Pipe Fittings	6,909
5	155	Pipeline Construction	1,025,262
6	156	Buildings	42,228
7	157	Boilers	2,192
8	158	Pumping Equipment	13,987
9	160	Other Station Equipment	88,479
10	161	Oil Tanks	8,440
11	162	Delivery Facilities	232,672
12	163	Communications Systems	502
13	164	Office Furniture & Equipment	167
14	165	Vehicles & Other Work Equipment	8,365
15		Total Original Cost	$1,465,170[1]
16		Total Excluding Land	$1,460,676
17		Total Excluding Land and Rights of Way	$1,460,511

NOTE:
1. Includes estimated Alyeska costs based on Project budget approved April 14, 1977. Subsequent revisions are anticipated.

Response of BP Pipelines to Request for Tariff Data.

EXHIBIT E
PAGE 2 OF 2

BP PIPELINES INC.

ESTIMATED ORIGINAL COST OF PROJECT EXPANSION
AT ESTIMATED COMPLETION DATE, JANUARY 1, 1980
($000)

	Account No.	Account Title	Amount
	(a)	(b)	(c)
1	158	Pumping Equipment	$ 8,013
2	160	Other Station Equipment	53,419
3	161	Oil Tanks	46,968
		Total	$ 108,400

Response of BP Pipelines to Request for Tariff Data.

EXHIBIT F
PAGE 1 OF 5

BP PIPELINES INC.

ESTIMATED COST OF REPRODUCTION NEW
AT DECEMBER 31, 1977
($000)

	Account No.	Account Title	Amount
	(a)	(b)	(c)
1	153	Line Pipe	$ 53,090
2	154	Line Pipe Fittings	12,077
3	155	Pipeline Construction	1,041,116
4	156	Buildings	63,265
5	157	Boilers	3,564
6	158	Pumping Equipment	13,932
7	160	Other Station Equipment	140,192
8	161	Oil Tanks	56,711
9	162	Delivery Facilities	37,936
10	163	Communication Systems	512
11	164	Office Furniture and Equipment	170
12	165	Vehicles and Other Work Equipment	16,796
13		Total Cost of Reproduction New Excluding Land and Right-of-Way	$1,439,361

BP PIPELINES INC.

Computation of Estimated Cost of Reproduction New - Initial Project
at December 31, 1977 through 1981
($000)

EXHIBIT F
Page 2 of 5

Line No.	Year (a)	Carrier Property Accounts 152 (b)	154 (c)	155 (d)	156 (e)	157 (f)	158 (g)	160 (h)	161 (i)	162 (j)	163 (k)	164 (l)	165 (m)	Total (n)
1	Original Cost Less Overheads													
2	1969	2,217	---	1,900	475	---	---	---	---	---	---	---	---	4,592
3	1970	12,989	---	12,356	475	---	---	---	---	---	---	---	---	25,820
4	1971	4,435	475	7,603	159	---	---	1,109	---	---	---	---	---	13,781
5	1972	---	---	3,009	---	---	---	792	158	159	---	---	---	4,118
6	1973	---	---	1,742	317	---	(158)	159	158	159	---	---	---	2,377
7	1974	---	634	110,564	6,494	158	1,109	4,435	2,693	950	---	---	158	127,195
8	1975	2,693	2,376	343,886	14,889	1,109	4,594	20,434	12,989	7,445	---	---	3,960	414,375
9	1976	2,218	6,335	280,210	22,652	1,268	5,226	43,401	19,959	15,206	---	---	3,643	400,118
10	1977	---	---	88,862	6,970	475	317	52,430	12,514	8,871	475	158	7,128	178,200
11	Total	24,552	9,820	850,132	52,431	3,010	11,088	122,760	48,471	32,790	475	158	14,889	1,170,576
12	Annual Indices													
13	1969	193	193	169	219	200	201	233	229	210	187	169	171	
14	1970	200	200	176	225	203	201	241	253	223	192	172	179	
15	1971	215	215	191	196	221	206	249	274	225	198	177	186	
16	1972	219	219	204	208	232	209	259	293	236	204	179	191	
17	1973	235	235	219	224	250	215	273	300	248	213	188	194	
18	1974	299	299	242	265	300	244	310	361	290	233	207	210	
19	1975	409	409	269	273	330	305	373	410	336	249	236	250	
20	1976	434	434	285	289	350	354	395	435	356	264	250	265	
21	1977	469	469	308	312	378	382	427	470	384	285	270	286	
22	1978	507	507	333	337	408	413	461	508	415	308	292	309	
23	1979	548	548	360	364	441	446	498	549	448	333	315	334	
24	1980	592	592	389	393	475	482	538	593	484	360	340	361	
25	1981	639	639	420	424	514	521	581	640	523	389	367	390	

BP PIPELINES INC.

Computation of Estimated Cost of Reproduction New - Initial Project
at December 31, 1977 through 1981
($000)

EXHIBIT F
Page 3 of 5

Line No.	Year (a)	Carrier Property Accounts 152 (b)	154 (c)	155 (d)	156 (e)	157 (f)	158 (g)	160 (h)	161 (i)	162 (j)	163 (k)	164 (l)	165 (m)	Total (n)
1	1947 Price Value													
2	1969	1,149	---	1,124	217	---	---	---	---	---	---	---	---	2,490
3	1970	6,495	---	7,020	211	---	---	---	---	---	---	---	---	13,726
4	1971	2,063	221	3,981	81	---	---	445	---	---	---	---	---	6,791
5	1972	---	---	1,475	---	---	---	306	54	67	---	---	---	1,902
6	1973	---	---	795	142	---	(73)	58	53	64	---	---	---	1,039
7	1974	---	212	43,688	2,451	33	455	1,431	746	328	---	---	75	51,439
8	1975	658	581	127,839	5,454	336	1,476	5,478	3,168	2,216	---	---	1,584	148,790
9	1976	511	1,460	98,319	7,838	362	1,618	10,908	4,588	4,271	---	---	1,375	131,330
10	1977	---	---	28,851	2,234	126	83	12,279	2,663	2,310	166	59	2,492	51,263
11	Total	10,876	2,474	315,092	18,628	877	3,559	30,985	11,772	9,256	166	59	5,526	409,770
12	Period Indices													
13	1977	424	424	287	295	353	340	393	437	356	268	251	264	
14	1978	473	473	311	315	381	380	431	474	388	288	273	289	
15	1979	510	510	335	339	411	415	464	511	417	310	293	311	
16	1980	551	551	362	366	443	449	501	552	451	335	317	336	
17	1981	595	595	391	395	479	485	541	596	487	362	342	363	
18	Current Year CRN Excluding Overheads													
19	1977	46,114	10,490	904,314	54,952	3,096	12,101	121,771	49,259	32,951	445	148	14,589	1,250,230
20	1978	51,443	11,702	979,936	58,678	3,341	13,524	133,545	53,429	35,913	478	161	15,970	1,358,120
21	1979	55,468	12,617	1,055,558	63,149	3,604	14,770	143,770	57,600	38,598	515	173	17,186	1,463,003
22	1980	59,927	13,632	1,140,363	71,838	3,885	15,980	155,235	62,221	41,745	556	187	18,567	1,584,136
23	1981	64,712	14,720	1,232,010	73,581	4,201	17,261	167,629	67,181	45,077	601	202	20,059	1,707,234

BP PIPELINES INC.

Computation of Estimated Cost of Reproduction New - Initial Project
at December 31, 1977 through 1981
($000)

EXHIBIT F
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Line No.	Year (a)	Carrier Property Accounts: 153 (b)	154 (c)	155 (d)	156 (e)	157 (f)	158 (g)	160 (h)	161 (i)	162 (j)	163 (k)	164 (l)	165 (m)	Total (n)
1	Current Year CRN Including Overheads (@ 1.151276438)													
2	1977	53,090	12,077	1,041,116	63,265	3,564	13,932	140,192	56,711	37,936	512	170	16,796	1,439,361
3	1978	59,225	13,472	1,128,177	67,555	3,847	15,570	153,747	61,512	41,346	550	185	18,386	1,563,572
4	1979	63,859	14,526	1,215,239	72,702	4,149	17,004	165,519	66,314	44,437	593	199	19,786	1,684,327
5	1980	68,993	15,694	1,312,873	82,705	4,473	18,397	178,718	71,634	48,060	640	215	21,376	1,823,778
6	1981	74,501	16,947	1,418,384	84,712	4,837	19,872	192,987	77,344	51,896	692	233	23,093	1,965,498
7	Condition Percent													
8	1977	100	100	100	100	100	100	100	100	100	100	100	100	
9	1978	94	94	94	93	93	93	94	93	93	93	93	74	
10	1979	89	89	89	87	87	87	89	87	87	87	87	50	
11	1980	84	84	84	82	82	82	84	82	82	82	82	50	
12	1981	79	79	79	77	77	77	79	77	77	77	77	50	
13	Current Year CRN Less Depreciation													
14	1977	53,090	12,077	1,041,116	63,265	3,564	13,932	140,192	56,711	37,936	512	170	16,796	1,439,361
15	1978	55,672	12,664	1,060,486	62,826	3,578	14,480	144,522	57,206	38,452	511	172	13,606	1,464,175
16	1979	56,835	12,928	1,081,563	63,251	3,610	14,793	147,312	57,693	38,660	516	173	9,893	1,487,227
17	1980	57,954	13,183	1,102,813	67,818	3,668	15,086	150,123	58,740	39,409	525	176	10,688	1,520,183
18	1981	58,856	13,388	1,120,523	65,228	3,724	15,301	152,460	59,555	39,960	533	179	11,547	1,541,254

EXHIBIT F

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BP PIPELINES INC.

COMPUTATION OF ESTIMATED COST OF REPRODUCTION NEW (CRN) PROJECT EXPANSION AT DECEMBER 31, 1980 AND 1981 ($000)

Carrier Property Account

Line No.	Year	158	160	161	Total
1	Original Cost Less Overheads				
2	1980	$7,098	$47,317	$41,560	$ 95,975
3	Annual Indices				
4	1980	482	538	593	
5	1947 Price Value				
6	1980	1,473	8,795	7,008	17,276
7	Period Indices				
8	1980	449	501	552	
9	1981	485	541	596	
10	Current Year CRN Excluding Overheads				
11	1980	6,614	44,063	38,684	89,361
12	1981	7,144	47,581	41,768	96,493
13	Current Year CRN Including Overhead (@ 1.120369688)				
14	1980	7,410	49,367	43,340	100,117
15	1981	8,004	53,308	46,796	108,108
16	Condition Percent				
17	1980	100	100	100	
18	1981	93	94	93	
19	Current Year CRN Less Depreciation				
20	1980	7,410	49,367	43,340	100,117
21	1981	$7,444	$50,110	$43,520	$101,074

Response of BP Pipelines to Request for Tariff Data.

EXHIBIT G

BP PIPELINES INC.

ESTIMATED WORKING CAPITAL
AT DECEMBER 31, 1977
($000)

Line No.	Description	December 31, 1977
	(a)	(b)
1	Cash Working Capital	
2	Estimated Operating Expenses	$55,341
3	Less: Depreciation Expense	24,917
4	Expenses Requiring Working Capital	$30,424
5	Average Daily Expenses (Line 4 ÷ 153 Days)	199
6	Net Lag (Days)	15
7	Cash Working Capital (Line 5 x Line 6)	2,985
8	Materials and Supplies[1]	6,336
9	Total Working Capital	$ 9,321

1. Estimated Alyeska Supplies of $40,000 x 15.84%.

Reply of Mobil Alaska Pipeline Company to Protests to its Tariffs Over the Trans Alaska Pipeline System, June 22, 1977.

BEFORE THE INTERSTATE COMMERCE COMMISSION

REPLY OF MOBIL ALASKA PIPELINE
COMPANY TO PROTESTS TO ITS
TARIFFS I.C.C. NOS. 1 AND 2
OVER THE TRANS ALASKA PIPELINE SYSTEM

[Remaining Caption Omitted in Printing.]

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REPLY OF MOBIL ALASKA PIPELINE COMPANY TO PROTESTS TO ITS TARIFFS I.C.C. NOS. 1 AND 2 OVER THE TRANS ALASKA PIPELINE SYSTEM

Preliminary Statement

Mobil Alaska Pipeline Company ("Mobil Alaska") hereby responds to four petitions protesting tariff rules and rates for pipeline transportation through its undivided five percent interest in the Trans Alaska Pipeline System ("TAPS").* Mobil Alaska objects to consideration by the Commission of any request or proposal for the suspension of its initial TAPS rate tariff pursuant to the provisions of 49 U.S.C. § 15(7), on ground that the Interstate Commerce Commission is without authority to suspend a tariff filed in the first instance.

All four protestants request the Commission to suspend the first and only tariffs of TAPS owners. Each further requests that upon suspension, the Commission enter an order allowing respondents to refile tariffs on one days' notice at substantially lower levels to be specified by the Commission in accordance with the protestants' own suggestions pending the full investigation of TAPS tariffs which is required by the Interstate Commerce Act. 49 U.S.C. § 1 *et. seq.* (hereinafter "the Act").

* The four protests filed June 15, 1977 seek suspension of the first and only rate tariffs for transportation in TAPS filed by seven of the eight undivided interest owners of TAPS. The protests include (1) Protest/Complaint of the State of Alaska Seeking Suspension and Investigation of Initial Rates, etc. ("Alaska Protest/Complaint"); (2) Protest and Petition of the Bureau of Investigations and Enforcement For Suspension and Investigation ("Bureau's Protest"); (3) Protest and Petition For Suspension By the United States Department of Justice, etc. ("Justice Protest"); and (4) Petition and Complaint By Arctic Slope Regional Corporation For Suspension of Initial Rates, etc., as supplemented June 16, 1977 ("ASRC Petition").

The protestants implicitly urge the Commission to award damages on the basis of their bare allegations that TAPS tariffs will, upon proper investigation and hearing, eventually be found unlawful. Should protestants' prejudgments prove mistaken, any damages extracted in these circumstances cannot be recaptured by the TAPS owners. Under the Act, a carrier has no right to recoup losses where undercharges are imposed by or result from Commission action. One unfamiliar with the Act might assume that the protestants who will reap these spoils directly are acting now because they will be unable to recover damages should the TAPS tariff level eventually be determined to be higher than the Act can allow. This is not the case. Both the Act and general legal principles fully protect one who is damaged by tariffs properly determined to be too high. Persons damaged can recover overcharges or other losses with interest. Thus, the Act is barren of any basis which would justify these allegedly emergency proceedings, and the protests fail completely to supply any justification for the Commission's apparent abandonment of those regulatory procedures established by statute.

Aside from their fundamental lack of fairness, protestants' relief requests exceed the Commission's statutory power and constitutional responsibilities. The Commission's power to suspend tariffs does not extend to tariffs filed in the first instance. The plain language of section 15(7) of the Act, 49 U.S.C. § 15(7), confirmed by its legislative history, is sufficient to demonstrate that the Commission's significant power to suspend extends only to proposed *changes* in rates.

The ICC lacks the power to set the rates of a carrier unless it has first conducted a "full hearing" on the lawfulness of a challenged rate and, based on the evidence ad-

duced in such hearing, made a determination that the challenged rate is unlawful under the Act. 49 U.S.C. § 15(1).* Such findings are then subject to judicial review. A summary suspension proceeding, such as that proposed for the TAPS tariffs, in which the Commission would assert broad discretion essentially immune from effective judicial review, could never suffice to satisfy the requirements of § 15(1). Moreover, the Commission cannot use the fiction of giving the carrier-to-be the options of not operating or else acceding to a Commission-specified rate level in order to create the illusion that the suggested new rate is a carrier-made rate and not an agency-made rate. See: *Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970). Even if suspension were permissible, the devastating effect of not operating converts the first choice into no choice at all. In reality, the choice which protestants would place on the TAPS owners is a choice between two unlawful alternatives. Mobil Alaska could not obtain restitution for the substantial losses resulting from either a suspension of operations for seven months or from operating under a low Commission-imposed rate for the pendency of a hearing which could take years. Adopting the fiction of the interim rate as a carrier rate, as the Bureau necessarily does for consistency in its theory of the suspension power, means that upon acquiesence in an interim rate order TAPS carriers are wholly deprived of the right to defend their rates in a full hearing. The Bureau's Protest and Petition at 12 recognizes that upon refiling an investigation would examine the *refiled* rate.

Mobil Alaska vigorously opposes any attempt by the Commission to evaluate and determine the reasonableness of the TAPS tariffs in the truncated proceedings presently

* See the Summary of Pipeline Regulatory Procedures issued by the Commission April 19, 1977.

scheduled to conclude in the oral arguments to be held on Monday, June 27, 1977. TAPS tariffs must be implemented as filed by the carriers. Any effort by the Commission to vary those tariffs as to either their stated rates or their time of effectiveness must be considered an egregious breach of the agency's statutory duty since it would result in the deprivation of the TAPS owners' most fundamental constitutional rights.

Mobil Alaska can assure the Commission of the following: *First,* that its tariff rate was calculated in accordance with the procedures followed on past pipeline tariff rate computations by other Mobil pipeline entities which have never been subject to protest or complaint; *Second,* during any investigation which may result from the protest filed against the TAPS tariffs, Mobil Alaska will demonstrate that its tariff is both lawful and reasonable; and *Third,* that the protestants' contention that an investor is entitled to no return on an investment made with borrowed money is irrational and, if adopted by the Commission, would have catastrophic impact on present and future operations by all pipelines.

ARGUMENT

I

PROTESTANTS REQUEST RELIEF WHICH THE COMMISSION IS WITHOUT AUTHORITY TO GRANT

A. THE COMMISSION IS WITHOUT AUTHORITY TO SUSPEND TAPS TARIFFS NOW ON FILE; THE SUSPENSION POWER MAY BE EXERCISED ONLY WITH RESPECT TO CHANGES IN RATES

Protestants' assumption that the suspension power conferred in § 15(7) of the Act applies to tariffs filed in the

first instance is inconsistent with the Act's regulatory scheme. The plain language of § 15(7) limits its application to rate changes, more specifically to new rates which affect pre-existing rates. The legislative history of § 15(7) confirms that limitation. Cases, particularly Supreme Court cases explaining and defining the Commission's regulatory power, have never suggested that § 15(7) could be utilized to enjoin operations of an entity seeking to commence common carrier operations under Part I of the Act. The Commission's authority to suspend a tariff in the first instance, however, has not previously been placed in issue. Consequently, neither courts construing the Act nor ICC decisions have squarely ruled on the precise question now raised by protestants' extraordinary requests.

1. The Regulatory Scheme Of Part I Is Inconsistent With The Existence Of Power To Suspend A Tariff In The First Instance

The regulatory scheme created by Part I of the Interstate Commerce Act, 49 U.S.C. §§ 1-27, ("Act"), leaves with the carriers the right, existing at common law, to initiate rates and to adopt such policy of rate making as the carrier deems wise, within the strictures of the Act. The rates, which are initially set by the carrier, are subject to limited revision by the Commission. However, ICC authority to set rates arises only after existing rates are examined in a "full hearing" and found unlawful. 49 U.S.C. § 15(1). The general purpose of this scheme is to give full play to competitive and market conditions and to permit innovative business response, with the ICC stepping in only to avoid discriminatory or anticompetitive practices or to promote transportation policy goals established by Congress. Pipe-

line carriers lack the economic insulation of franchised public utilities, which have exclusive, expanding markets in which to operate. Rather, pipelines go into business subject to existing or potential competition from other pipelines and other forms of transportation, and are subject to a full panoply of business risks.

The carrier's right to initiate rates is a predominate theme of the Act. To construe the suspension power so as to summarily revoke and reset a carrier-made rate is a drastic exercise which must rest on precise authorization in the Act. Protestants offer no such justification for the enormous power they attribute to the Commission.

The Supreme Court has consistently held that the Act has not taken from carriers the right to initiate rates and rate changes. As expressed in *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U.S. 88 (1913):

> Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order. 227 U.S. at 92.

The hearing referenced in the *Louisville* decision is, of course, a formal adjudicatory hearing with full evidentiary rights to present testimony, and cross-examine witnesses. *Id.* at 93. Justice Cardozo succinctly stated in *United States* v. *Illinois Central R. Co.*, 263 U.S. 515 (1924):

> A carrier is entitled to initiate rates, and in this connection, to adopt such policy of rate making as to it seems wise. 263 U.S. at 522.

The Act's commitment to carrier-initiated rates is too well-established to give rise to any serious dispute. Other cases declaring this regulatory principle include *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 311 (1975); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499 (1935); *Arizona Grocery Co.* v. *Atchison, Topeka & S.F. R. Co.*, 284 U.S. 370 (1932).*

These cases indicate that the commitment to carrier-initiated rates is part of the intent reflected in the Act to preserve market forces. For example, in *American Sugar Refining Co.* v. *Delaware, L & W R. Co.*, 207 F. 733 (3d Cir. 1913), the court declared the importance of strict conformance to the Act:

> Especially is this true as to those provisions of the act relating to the important and vital function of ratemaking and rate changing, which aside from statutory regulation and the requirements of the common law, as to the duty of common carriers, can be exercised within the domain of that freedom of contract that is incident, under free institutions, to individual enterprise. 207 F. at 737.

In connection with a statement that carriers initiate rates to adopt their own policy of ratemaking, the Court in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., supra*, noted with approval an ICC refusal to extensively prescribe rates because "[t]he forces of competition were left to do their work."

---

* *See also, Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919); *Cincinnati, New Orleans & Texas Pacific R. Co.* v. *Chesapeake & Ohio R. Co.*, 441 F.2d 483 (4th Cir. 1971); *American Sugar Refining Co.* v. *Delaware, L & W R. Co.*, 207 F. 733 (3d Cir. 1913); *Luckenbach Steamship Co.* v. *United States*, 179 F. Supp. 605 (D. Del. 1959); *Kenny* v. *United States*, 103 F. Supp. 971 (D.N.J. 1952).

The ICC's own opinions reflect the commitment to carrier-initiated rates. *See, e.g., TOFC, Freight, All Kinds, Plan IV*, 346 I.C.C. 25, 31-32 (1974); *Hanna Mining Co.* v. *Missouri Pacific R. Co.*, 322 I.C.C. 166, 171 (1968); *Carbon Black, S.W. to United States and Canada*, 298 I.C.C. 721, 726-27 (1956).

Accordingly, the rate which a carrier establishes in its lawfully filed tariffs is automatically designated as the "legal" tariff which all must pay and from which the carrier may not deviate. If the tariff is subjected to scrutiny by the Commission in a full hearing pursuant to § 15(1), and approved, the "legal" tariff becomes the "lawful" tariff. An injured party may apply for reparations for charges exacted under an unreasonable legal tariff, but no reparations may be recovered by loss incurred pursuant to a lawful tariff. *Arizona Grocery Co.* v. *Atchison, Topeka & S.F. R. Co., supra.*

Consistent with the commitment to carrier-initiated rates, the Act is generally committed to preserving or continuing transportation services by Part I carriers pending resolution of disputes over specific rates and practices. Accordingly, the Commission is not explicitly given the authority to stop the lawful operations of any Part I carrier. Protestants' request for an exercise of the suspension power to achieve this result in the present circumstance is wholly inconsistent with this purpose and intent of the Act.

The starting point, for purposes of an understanding of the regulatory scheme, is identifying at what point an entity becomes a common carrier subject to Part I of the Act.

Section 1 of the Act declares who is subject to regulation:

> (1) The provisions of this Chapter shall apply to common carriers engaged in—
>
> (a) [Railroads]

> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—
>
> [in interstate commerce]. 49 U.S.C. § 1(1).

The operative words are "engaged" in "transportation." The word "engaged" connotes a pipeline carrier *which has commenced* the actual transportation of crude or other commodity, and strongly suggests that a pipeline in its construction phase is not subject to regulation. Courts have so held.* Commencement of actual transportation operations is the statutory trigger for jurisdiction of ICC. The implication which must be drawn from § 1 is that it is the carrier-to-be which controls the point at which it becomes a common carrier subject to the Act. Operation of the suspension power on the first and only tariff of a Part I carrier is wholly inconsistent with this scheme.

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* *Schmitt* v. *War Emergency Pipelines*, 175 F.2d 335 (8th Cir. 1949), *cert. denied*, 338 U.S. 869. Schmitt clearly viewed the actual commencement of crude oil transportation through a pipeline as the operative jurisdictional fact for purposes of § 1. Timing of commencement of ICC jurisdiction is rarely an issue. Most cases assume that actual movement of crude, *i.e.*, actual transportation operations, are necessary for definition as a common carrier subject to the Act. *See, e.g.*, The Tap Line Cases, 234 U.S. 1 (1914); *United States* v. *Mississippi Valley Barge Line Co.*, 285 F.2d 381 (8th Cir. 1960); *Walling* v. *Rockton & Rion R.R.*, 54 F. Supp. 342 (W.D.D.C.), *aff'd*, 146 F.2d 111, *cert. denied*, 324 U.S. 880 (1945).

Further support for the view that actual commencement of transportation operations is the event triggering ICC jurisdiction is found in the common law definition of a common carrier, incorporated by the Act, as one holding himself out as ready, willing and able to engage in transportation for hire. *See, e.g., Home Insurance Co.* v. *Riddell*, 252 F.2d 1 (5th Cir. 1958); *Pacific Northern Airlines* v. *Alaska Airlines*, 80 F. Supp. 592 (D. Alas. 1948); *Kelly* v. *General Electric Co.*, 110 F. Supp. 4 (E.D. Pa.), *aff'd*, 204 F.2d 692, *cert. denied*, 346 U.S. 886 (1953); *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475, 491 (D. Ore. 1953).

The Commission is given no authority to control who will enter into the petroleum pipeline business, nor does the Act permit it to dictate when or where a pipeline may operate. It is not given power to shut down a carrier's lawful operation, either permanently, or temporarily, despite serious violations of the Act. On the contrary, its most important powers at the outset of a carrier's transportation life is to require adherence to rate filing requirements of § 6 and to institute formal investigations of rates alleged to be unlawful pursuant to § 15(1).

Section 6 of the Act governs the publishing and filing of tariffs. Section 6(1) declares that every common carrier shall file such tariffs and specifies what shall be included therein. Section 6(7) prohibits operations in the absence of such publication and filing of tariffs. The sanctions for operation without a duly filed and published tariff are civil penalties in the form of fines. § 6(10). A tariff may be rejected for filing by ICC only if it is not in the "form and manner as the Commission may prescribe by regulation", § 6(6), or if it fails to notice an effective date for the tariff, § 6(9). No authority to enjoin a carrier's operations is granted, nor can the Commission refuse to file a tariff or otherwise leave a carrier without a lawful tariff for substantive reasons, much less on a mere allegation by protestants that a rate is unlawful. The power to reject a tariff which does not comply with Commission regulations as to form is as close as the Commission can come to putting a carrier out of lawful business, yet defects in form or date are of little consequence and can be cured in a matter of hours or days. Once filed, no deviations from the filed rate are permitted. The provisions of § 6 generally evidence the commitment to carrier-initiated rates and to free operation of carriers in a competitive market.

Once a Part I carrier has commenced operations and established its initial tariff, changes in those existing tariffs are governed by § 6(3). This subsection requires that "new" tariffs, which embody changes and are proposed to replace existing tariffs, be posted and filed on thirty days' notice.

The most pertinent section of the Act, for purposes of evaluating the propriety of the relief which protestants request, is § 15 which governs, *inter alia,* the "Determination of rates." 49 U.S.C. § 15. Because of the commitment to carrier-initiated rates, § 15(1) limits the Commission to prescription of rates only by issuance of an order upon "full hearing", which includes a panoply of discovery and procedural rights, and upon a specific finding of unlawfulness under the Act.

The purpose of the full hearing rights given to carriers in § 15(1) and the power given the Commission to prescribe rates only upon findings of unlawfulness is to provide full due process protection to the Act's overall commitment to carrier-initiated rates. Even the ultimate power of ratemaking does not stop lawful transportation operations unless a carrier refuses to comply with a final Commission Order pursuant to § 15(1). But only in this special circumstance, and on substantive grounds, can the Commission take action which would leave a carrier without a lawful tariff. Carriers whose rates have been so prescribed pursuant to § 15(1) cannot escape the effects of the Commission's prescription by refiling at levels of its own choice because of the Commission's power of suspension over such rate changes. § 15(7).

The Suspension Power

The suspension power is governed by paragraph (7) of § 15. Added to the Act in 1910, it embodies an important

power auxiliary to the Commission's power to prescribe rates pursuant to § 15(1). While the Act does not permit the Commission to prescribe or establish rates until there has been a "full hearing" and a finding that carrier rates are unlawful, it does create an interlocutory step in the process of evaluating changes in carrier-made rates which is designed to avoid hardships where allegations of unlawfulness are made. Section 15(7) permits the Commission to "suspend" a proposed "new" rate for a statutorily limited period pending a full investigation. Suspension may be ordered on the Commission's own initiative or in response to petitions by shippers or others who object to the proposed rates. The 30 day notice period for filing of rate changes specified in § 6(3) is thus necessary to allow for protests to be made and to permit the Commission to make the preliminary, interlocutory decision to suspend a proposed rate change.

The decision to suspend is within the Commission's discretion so long as it is adequately supported with stated reasons.* No reasons are necessary to support denial of a suspension request. The logical effect of suspension is to leave the pre-existing rates in effect during the suspension period and preserve carrier transportation operations. Suspensions are not, therefore, to be lightly granted for the carrier can never recoup losses from such delay of increases in rates during suspension even though his proposed changes are ultimately approved as lawful. Where the new rate is not suspended but ultimately found unlawful, shippers or others injured thereby have the right to recover reparation or damages.

* *E.g., Port of New York Authority* v. *United States,* 451 F.2d 783 (2d Cir. 1971); *Oscar Mayer & Co.* v. *United States,* 268 F. Supp. 977 (W.D. Wisc. 1967).

Section 15(7) further states that the burden of proving the lawfulness of rate change is on the carrier if a suspension order has issued. On the other hand, ICC law and practice clearly establishes that the burden of proof of unlawfulness of an initial rate must be on the challengers thereto, rather than the carrier. To reconcile these two regulatory rules leads ineluctably to the conclusion that suspension orders do not apply to initial rates.

It is apparent that if there is no pre-existing tariff, a Commission suspension is not authorized. Such a suspension would either shut down or delay the carrier's operations for the statutory period, or require in effect an interim, Commission-established rate (one which the Commission indicates it will not suspend) in violation of § 15(1). This logical result of the regulatory scheme is rejected by protestants. However, protestants' illogical efforts to get around inconsistencies in their legal positions on Commission suspension power merely signal the overall deficiencies in their argument.*

The Act is clearly committed to preserving transportation services pending any dispute. This policy is evi-

* The Bureau, for example, in the interests of consistency, turns plain English into a looking-glass exercise by explaining how the word "increases" in § 15(7) should be construed to apply to the first and only tariff of a Part I carrier. (Bureau's Protest and Petition at 33-35). Similarly, when confronted with a situation in § 15(7), statutorily applicable only to changed rates, the Bureau dissembles, noting that the Commission "has not distinguished between changed and initial rates" in the relevant context. It then boldly asserts that the power necessary to get around this little problem can be implied from the Federal Power Commission's regulations. *Id.* at 11, n. 10. The Department of Justice glides around inconsistencies by addressing only the burden of proof law under § 15(7) and then wholly misstating it. (Justice Protest at 8). The State of Alaska argues in its Protest/Complaint at 18-19 that suspension of initial rates is eminently logical because the TAPS tariffs are "unlawful" apparently by-passing the requirements of § 15(1) and urging that a finding of unlawfulness can be presumed in the current summary context because Alaska says it is so.

denced first, in the suspension scheme itself; second, in the Act's grant of the right to recover damages or reparations thereby incurred to shippers and others who may be injured by rates eventually determined to be unlawful; and, third, by the absence of sanctions or authority in the Commission to effectively enjoin operations of a carrier in the absence of adjudicatory findings of violations of the Act. Considered in light of the Act's commitment to carrier-initiated rates, its placement of control with the carrier over when and where it will operate, and its commitment to preservation of transportation services pending full and fair resolution of disputes, it would be manifestly inconsistent to turn § 15(7) into a mechanism for disrupting this regulatory scheme. Section 15(7) is designed to preserve the status quo pending resolution of disputes over the lawfulness of a tariff proposed by a carrier. To turn it into the power to enjoin the legal operations of a carrier would add a startling new dimension to the existing regulatory scheme.

2. The Plain Language of § 15(7) Limits Its Applicability to Tariffs Which Replace Or Change Existing Tariffs

Mobil Alaska submits that the most direct test of whether § 15(7) applies to the first and only tariff of a Part I carrier—examination of the statutory language—is sufficient to demonstrate that protestants' requests for relief are legally unauthorized. The main thrust of the arguments of the Bureau and the State of Alaska is that § 15(7) applies to all tariffs or to tariffs in the first instance because of the statutory use of the term "new."*

* Alaska's Protest/Complaint at 17-18; Bureau's Protest and Petition at 11.

The use of the term "new," they argue, means that all tariffs are encompassed. This is plainly a misreading of the suspension provision. The term "new" tariff simply refers to a tariff whose filing replaces an "old" or pre-existing tariff. The very use of the modifier "new" to describe the tariff schedules necessarily indicates that something less than all tariffs was encompassed. Moreover, elsewhere in the Act, Congress uses the term "new" when it refers to tariffs replacing or changing pre-existing tariffs, and uses no such modifier when it refers to all tariffs.

Read in context, the use of the word "new" to describe the tariffs subject to the suspension power in § 15(7), demonstrates it is another means of describing tariffs which are changes from pre-existing tariffs of the same carrier. Section 15(7) provides:

> § 15, par. (7). [1] Whenever there shall be filed with the Commission *any schedule stating a new individual or joint rate,* fare, or charge, or any *new* individual or joint classification, or any *new* individual or joint regulation or practice *affecting any rate, fare, or charge,* the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule

and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. [2] If the proceeding has not been concluded and an order made within the period of suspension, *the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect* at the end of such period; [3] but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. [4] At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over

all other questions pending before it and decide the same as speedily as possible. (Emphasis and brackets supplied).

It is impossible to read the first sentence's reference to "any schedule stating a new . . . rate . . . affecting any rate," Clause [1], as meaning anything but that such new rate is only new because it affects or changes another pre-existing (or "old") rate. Moreover, the second sentence plainly refers back to the very same category or tariff schedule addressed in the first sentence by the more convenient phrase "the proposed *change* of rate, fare . . ." Clause [2]. Subsequently, the statute, clause [3], specifically engages in a fine distinction between those changes which are increases and those which are not. The final sentence, addressing burden of proof, clause [4], is a straightforward reference to all the hearings instituted pursuant to § 15(7) and again refers to them as hearings "involving a *change* in a rate." It is a simple matter to read this statute as applying to rate changes, and, as more fully discussed below, the Supreme Court, other federal courts, and commentators have assumed that only changes in tariffs were involved. On the other hand it requires an unperceptive eye to construe this language as applying to all tariffs, as must be done to find this paragraph applicable to the challenged TAPS tariff of Mobil Alaska.

Section 15(7)'s companion section is § 15(1), which paragraph's reference to *all* tariffs is plain and undisputed. Where reference to all tariffs is intended Congress uses no qualifier such as the term "new" which appears in § 15(7). It plainly states "that any individual or joint rate" is subject to paragraph (1).

A similar statutory pairing is found in paragraphs (1) and (3) of § 6 which governs tariff filing. Paragraph (1) of § 6 which requires all carriers to file and publish tariffs, uses the words "all" rates of "every" carrier. Section 6(3) which plainly governs changes, like § 15(7), also uses the term "new" and, as in § 15(7), uses it in a context which equates it with changed tariffs. Section 6(3) provides in pertinent part:

> *Change in rates, fares, etc.: notice required; simplification of schedules*
>
> (3) No *change* shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the *changes* proposed to be made in the schedule then in force and the time when the *changed* rates, fares, or charges will go into effect; *and the proposed changes shall be shown by printing new schedules*, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: . . . 49 U.S.C. § (3) (Emphasis supplied)

It requires no mystical talents to discern that the suspension power of § 15(7) was conferred only with respect to tariff changes; that the power was never designed to apply to tariffs in the first instance where no pre-existing carrier-made tariff is on file to permit continued transportation services. In his treatise on the Commission, Professor Sharfman discusses the suspension power as a power affecting changes and uses the term "new" to refer

to the tariffs which incorporate these changes. He states that through the suspension power

> the public was accorded substantially the same degree of protection against the imposition of burdensome and inequitable *new rates* which the railroads enjoyed against the condemnation of *existing rates.* [Pending adjudication of existing rates] . . . *the old rates remained in effect until the final disposition of the proceeding . . . In like manner,* under the authority of the Commission to suspend proposed *changes* in rates, the railroads might be shorn of the power to disturb existing rates except after investigation of the *new* schedules by the Commission; and since the reasonableness of the *charges already in effect* would not necessarily have been adjudicated . . . the burden was cast upon the railroads to justify the advanced rates proposed by them.*

Similarly, the Supreme Court in *United States* v. *SCRAP*, 412 U.S. 669, 697 (1973), equated "new" with "increased."

> [W]e stressed in Arrow that § 15(7) represents a careful accommodation of the various interests involved. The suspension period was limited as to time to prevent excessive harm to the carriers, for the revenues lost during that period could not be recouped from the shippers. On the other hand, Congress was aware that if the Commission did not act within the suspension period then the *new* rates

* 1 Sharfman, INTERSTATE COMMERCE COMMISSION 59-60 (1931). (Emphasis supplied). (See also Spritzer, Uses of the Summary Power to Suspend Rates, 120 U. Pa. L.R. 39 (1971); Goodman, The History and Scope of Federal Power to Delay Changes in Transportation Rates, 19 I.C.C. Prac. J., 245.

> would automatically go into effect and the shippers would have to pay *increased* rates that might eventually be found unlawful. To mitigate this loss [the special accounting procedures were included].* (Emphasis added)

While such analysis would seem sufficient to dispose of the question, it is necessary to go further and explore the legislative history of § 15(7) since the Commission, by issuing the order pursuant to which this reply is submitted, evidences its preliminary view that it can suspend Mobil Alaska's original TAPS tariffs. The record of Congressional intent conclusively demonstrates that § 15(7) applies solely to changes in pre-existing tariffs.

3. The Legislative History to § 15(7) Confirms That It Applies Only To Changes In Pre-existing Tariffs

Section 15(7), conferring the significant power to suspend, was added to the Interstate Commerce Act in 1910 by the Mann-Elkins Act, Pub. L. No. 218, 36 Stat. L. 539, ch. 309, June 18, 1910. The 1910 legislation permitted suspension for up to 120 days from the effective date of the tariff, with power to extend the suspension period an additional six months. Section 15(7) has been modified since 1910, most particularly, the period of suspension has been reduced and then enlarged to the existing seven-month

* Note the concern that a carrier subject to a suspension order would be unable to recoup its lost revenues from shippers if its rates were ultimately vindicated following full adjudication. Obviously such concern presumes that transportation for shippers will continue during the suspension period. The same opinion declares that the Commission may prescribe rates only pursuant to § 15(1), precluding the possibility that a quick prescription of rates could mitigate the drastic effect of suspension of a first and only tariff.

maximum,* but the language relevant to determining whether it applies to changes or to all rates has remained literally unchanged. Examination of the legislative history of the Mann-Elkins Act unequivocally demonstrates that § 15(7) was enacted in order to give the Commission some power to deal with the problem of spiraling rate increases and that it was drafted to apply only to proposed changes in existing rates. This history conclusively shows that § 15(7) was not intended to apply to a carrier which had no pre-existing rate on file. As summarized in *Sharfman, supra*:

> The rate-suspension power as originally conferred upon the Commission in 1910, was a notable extension of its authority. It made possible the investigation of changes in rates, both as to their reasonableness *per se* and as to the equitableness of their adjustment, prior to actual enforcement of the new tariffs. Without infringing on the ultimate rights of the carriers to initiate rates and charges, this power enabled the Commission to enter upon the regulating process at an earlier stage than in the usual proceedings upon complaint, and thereby to prevent, at the threshhold, rate changes likely to violate the basic standards of the Act to Regulate Commerce. . . . ***The old rates remained in effect till the completion of the Commission's investigation.*** *Id.* at 201-2 (Footnotes omitted.)

* The Transportation Act of 1920, 41 Stat. 487, ch. 91, tit. IV, § 418 (1920), reduced the maximum of ten months to five months. In 1927 the Commission successfully sought extension of the period as it was unable generally to conclude full hearings within five months. The Act was then amended to its present format to allow a seven month suspension. 49 U.S.C. § 15(7) (1970). The special accounting procedures for increases were added in 1920.

The legislation was proposed in response to widespread concern over dramatic ever-increasing railroad rates. President Taft drafted legislation to respond to this concern and sent a Presidential Message to Congress explaining his and others' proposals to cure the problem. The concern was solely with the Commission's inability to adequately respond to changes in existing tariffs:

> Under the existing law the commission may not investigate an increase in rates until after it shall have become effective; and although one or more carriers may file with the commission a proposed increase in rates or change in classifications, or other alteration of the existing rates or classifications, to become effective at the expiration of thirty days from such filing, no proceeding can be taken to investigate the reasonableness of such proposed change until after it becomes operative. . . . It has, therefore, been suggested that the commission should be empowered, whenever a proposed increase in rates is filed, at once to enter upon an investigation of the reasonableness of the increase and to make an order postponing the effective date of such increase until after such investigation shall be completed. (41 Cong. Rec. 462, Jan. 10, 1910).

The existing reparations rights of shippers were deemed inadequate to counter the onslaught of railroad rate increases, and it was felt that the Commission, which at that time was much smaller than now, could not effectively use its adjudicatory powers to address all increases after they took effect. President Taft endorsed the solution which became § 15(7):

> I therefore recommend that the Interstate Commerce Commission be empowered *whenever any proposed increase of rates is filed*, at once, either on complaint or of its own motion, to enter upon an investigation into the reasonableness of such *change*, and that it be further empowered, in its discretion, to postpone the effective date of such proposed *increase* for a period not exceeding sixty days beyond the date when such rate would take effect. If within this time it shall determine that such *increase* is unreasonable, it may then, by its order, either forbid the *increase* at all or fix the maximum beyond which it shall not be made. If, on the other hand, at the expiration of this time, the commission shall not have completed its investigation, then the rate shall take effect precisely as it would under the existing law, and the commission may continue its investigation with such results as might be realized under the law as it now stands. *Id.*•

This recommendation was adopted, although a longer suspension period was enacted. Indeed, the basic concept—the power to suspend rate changes pending full investigation—was scarcely disputed by Congress, while the real controversy was over the maximum length of the suspension period.•• The sixty day period drafted originally and recommended by the President was extended to 120 days, primarily on account of testimony by the Commission.••• An extension beyond 120 days for up to an additional six months was added in response to pressure from radical elements in Congress who sought to make all new rates

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• Emphasis supplied. Emphasis in remainder of this section is supplied unless otherwise indicated.

•• *See, e.g.*, 45 Cong. Rec. 6409, 6500-01, 6510-11, 6900-01.

••• 45 Cong. Rec. 6791, May 24, 1910; Sen. Report No. 355 at 9.

dependent upon Commission approval. While direct legislation to this effect was not likely to pass, they urged that the period of suspension be allowed to extend until completion of the formal rate investigation.* While debates over § 15(7) concerned the length of the suspension period, both sides of the debate repeatedly indicated their understanding that the proposed amendment would apply only to changes in rates. The report of the Senate Committee on Interstate Commerce, discussing the bill which emerged from committee with the present language of § 15(7) describing its applicability, addressed the proposed § 15(7) under the heading "INVESTIGATION BY THE COMMISSION OF PROPOSED INCREASE IN RATES," Sen. Rep. No. 355, 61st Cong., 2d Sess. at 8. The report described the problem and then set forth the debate:

> To meet this situation it has been contended by some that the commission should be empowered to postpone the date when a proposed *increase* in rates should become effective until it should complete an investigation into the reasonableness of the proposed *increase;* while on the other hand it is urged on behalf of the railroad companies that such action would bear unjustly upon the carriers, as, if at the termination of such investigation it should be found that the proposed increase was reasonable and proper, *the carrier would have lost the entire benefit of the increase in rates* during the period of investigation, without any means of reparation. (Sen. Rep. No. 355 at 8-9).

The majority of the Interstate Commerce Committee resolved this dilemma by adopting the suspension power but

* See Sen. Rep. No. 355, Part 2, Views of the Minority, March 7, 1910; 1 Sharfman, *supra*, at 59 n. 61.

limiting the suspension period to minimize harm to the carrier whose proposed rates are ultimately vindicated.

> A majority of the committee is of opinion that the Interstate Commerce Commission should be authorized to commence the investigation of a proposed increase in rate, or change in classification, as soon as it is filed with the commission, and that at any time before the rate or classification would become effective, the commission should, in its discretion, be empowered, by order stating its reasons therefor, to postpone the effective date of such increase or classification for a reasonable period to enable it to investigate the proposed action.
>
> The bill fixes this reasonable period at sixty days, thus giving the commission ninety days in all within which to complete its investigation—a length of time which can not possibly work any serious hardship to the railroad companies, and which, on the other hand, will afford the commission opportunity with due diligence to complete or, at all events, to make substantial headway in any such investigation. (*Id.* at 9)

The concern with unjust denial of revenues to carriers whose proposed rates are ultimately approved following suspension was clearly with loss of incremental *increase* in revenues. Nowhere in the legislative history is there even contemplation of a suspension power that could deny *all* revenue during the suspension period, the necessary effect of § 15(7)'s application to tariffs filed in the first instance.

The minority report understood the new provision to apply solely to changes, but expressed little sympathy for carriers who would lose the benefit of increased revenues during suspension:

Protest Reply of Mobil Alaska.

The second paragraph of the section [Sec. 9 of S. 6737, now § 15(7)] is entirely new to the law. It confers upon the commission the *power to suspend changes in rates* pending a hearing upon the propriety of the *change,* for not to exceed sixty days beyond the time when the proposed *changes* would otherwise go into effect. We fear that the limitation will nullify the object sought to be accomplished, because it is admitted that it would be impossible for the commission to make the proper investigation of the larger number of the *changes* that will be made within the time so fixed. It is so vital to the business of the country that there shall be a reasonable supervision exercised by the commission before *changes* in rates shall go into effect, that we earnestly recommend an amendment which will permit the suspension to continue until the hearing is concluded. *Id.*, Part II at 9.

In describing the bill as reported from the Committee on Interstate Commerce,* with an extension to 120 days of the suspension period, Senator Cummins stated:

* The provision as reported from the Senate Committee provided: Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint, classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate,

Protest Reply of Mobil Alaska.

> I first take the provision as it is reported by the committee. May I remind Senators just what it is? It provides that after the passage of this bill, *when changes in rates are made or sought to be made* by railway companies, the Interstate Commerce Commission may, if it is moved to do so, either upon complaint or upon its own initiative, suspend such of the rates as it desires to suspend for a period of not more than one hundred and twenty days. (45 Cong. Rec. 6777, May 24, 1910).

By way of example he clarified its application to tariff changes, that is, to new tariffs which take the place of preexisting or old tariffs:

> If you will imagine with me a schedule going before the Interstate Commerce Commission, I think we can soon reach exactly the result of this bill if it becomes a law. A schedule is filed, presenting *changes* in rates. There is no discrimination now in the bill as to whether the rates are increased or decreased, or whether they remain as they were. The commission takes up that schedule, and then it must determine whether the rates found in it, or any part of them, are to be suspended or not. *Id.*

Sen. Cummins had introduced an amendment to the provision reported out which would supersede in part the 120

fare, charge, classification, regulation, or practice, but not for a longer period than sixty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect. [As reported in 45 Cong. Rec. 6500 (May 19, 1910)].

The provision as enacted into law in 1910 substituted "one hundred and twenty" for "sixty." 36 Stat. L. 552, ch. 309, 61st Cong., 2d Sess. (1910).

day language by allowing the suspension period to extend until conclusion of any investigation in the case of new rates which were *increases.** There is no doubt that the provision's use of the term "new" rate was intended to apply to changes, *i.e.,* tariffs replacing old rates.

> Mr. Cummins. There is a general provision in the bill that all *changes* in rates may be suspended for a period of one hundred and twenty days to enable the commission to examine the *new* rates so filed, and that applies to reductions, to the maintenance of the level of rates theretofore existing, and to increases of rates as well. *Id.* at 6778.

Contrary to the Bureau of Investigations and Enforcement's contention and Alaska's similar contention, the phrase "any schedule stating a new . . . rate" was not in-

* The Cummins amendment contained the same relevant language as the 1910 version of § 15(7) which passed and which is still in effect. It would have added the following proviso to the approved Committee provision:

> Provided, however, That whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge which is an increase over the then existing rate, fare, or charge, or any new individual or joint classification which effects such increase, the operation of any such increase shall be suspended and the use of any such increased rate, fare, charge, or any new individual or joint classification which effects such increase, the operation of any such increase shall be suspended and the use of any such increased rate, fare, charge, or classification shall be deferred until after full hearing and shall take effect only after the commission has found and declared the same to be just and reasonable. . . . 45 Cong. Rec. at 6499.

Cummins effort was unsuccessful. The proviso actually added allowed an extension of the suspension period for all new rates for up to six months if a full hearing was not concluded at the end of the initial 120 day suspension. 36 Stat. L. 552. Ch. 309, 61st Cong., 2d Sess. (1910).

tended to encompass all rates. Rather the term "new" rate was intended to refer to one replacing an 'old' rate. The repeated statements that the provision applies to changes are not the only evidence that the language itself had been drafted to exclude initial rates. The following uses of the term "new" are instructive.

> [By Sen. Hayburn, referring to Sen. Cummins amendment] . . . It does not disturb the provisions of the section prior to that unless it should be inconsistent with them. I think the provisions contained in the bill is stronger and more effective than that contained in the amendment. Let us see briefly. In the bill it is provided that—
>
> "Whenever there shall be filed with the commission any schedule stating a new individual or joint rate — —"
>
> *That may be higher or lower — —*
> "fare, or charge, or any new individual or joint classification — —"
>
> *That may be higher or lower — —*
> (45 Cong. Rec. 6792-3)

In a statement exploring whether under the Cummins version the new rate automatically went into effect at the end of the six month suspension extension, Sen. Dolliver remarked:

> But the Senator from Arkansas says "No; if they are not decided, if the six months pass away and no decision is rendered, then the *new rate increasing the old* goes into effect . . . .
>
> *If it means that the old rate remains at the end of six months awaiting the decision of the commission*

> *upon the new rate, I have no objection to it.* If it means that a failure to decide inside the six months puts into effect the new rate, increasing the old rate, I doubt very much whether there is any wisdom in it . . . . 45 Cong. Rec. at 6792.

Senator Dolliver was quickly assured that the emphasized sentence reflected the actual impact of the Cummins version which he favored, and did not mean that the old rate ceased upon the end of the suspension period. *Id.* Under either version, all assumed that the operative language "any schedule stating that a new . . . rate" necessarily meant that there was an old or pre-existing rate which would remain in effect during the suspension period, thus preserving transportation services. This understanding is also shown in the following exchange:

> Mr. Dolliver. Suppose they fail within six months to so proceed with that hearing as to enable the commission to render a decision upon it, in what shape would the failure of the commission to decide leave the proposal of the railroad to increase the schedule of rates?
>
> Mr. Martin. [The Cummins amendment] would leave the old rate in existence, and the application to increase it would be denied, as it ought to be denied, until the commission is satisfied that the increase should be made.
>
> Mr. Rayner. I have not any doubt about it, but still *why not put in a provision that the old rate shall remain until the Interstate Commerce Commission is affirmatively satisfied that the increase is just?* 45 Cong. Rec. at 6788.

This is but a sample of numerous indications that the operative language of § 15(7) was understood by its drafters to apply only when the carrier subject to a suspension order had a preexisting tariff on file which could remain in effect during the period of suspension. The gist of § 15(7) is to preserve the status quo, it preserves transportation services pending resolution of disputes. Most importantly it does so in a way which avoids reliance on any improperly prescribed Commission-made rate. Rather, by the fallback onto the pre-existing rate, the carrier's right to initiate rates is preserved because a carrier-made rate continues in effect until and unless a proper Commission-finding of unlawfulness has been rendered. Even Sen. Cummins, who would happily have permitted suspensions of tariff increases for years and years pending conclusion of formal hearings, appreciated the importance of the carrier's right to initiate its rate and charge it until such time as a proper finding of unlawfulness had been rendered. He observed:

> I am always rather sympathetic with the underdog; and inasmuch as the railway companies have fixed their present rates, it is not to be assumed that any great hardship will be done if, until the increases receive the approval of the commission, *they are required to be content with the rates that they themselves have established.* 45 Cong. Rec. 6503, May 19, 1910.

He also stated:

> But, as I was about to say when interrupted by the Senator from Idaho, this bill as it is may, and probably will, result in some of the rates being examined before they take effect. The exception which I propose says nothing more than that increases in rates

> shall be examined before they take effect. *It seems to me it is only right and fair that the railway companies, having established the rates, and they being presumably, therefore, reasonable from the railways' standpoint, ought not to be permitted to increase them until the Government has said the change is fair and right.* *Id.* at 6504.

Further evidence of the understanding that transportation services at pre-existing rates would continue during a suspension exists:

> Mr. Jones . . . If the shipper has to pay an unreasonable rate, he has his remedy. It may not be as effective as we would like, but he can recover his overpayments. But suppose that the railroad desires to put into effect a rate which is an increase and which is finally determined to be a reasonable rate, but the decision upon it is delayed for six months or a year or two years; what remedy has the railroad company [subject to a suspension order during that time] for being deprived of a just compensation *for the service it has rendered during that time?* Has it any?
>
> Mr. Cummins. It has none.
>
> Mr. Jones. That was my impression.
>
> Mr. Cummins. And it ought not to have. We can not administer perfect justice in a country like ours, or in any other of which I know. We must approach justice as nearly as possible.
>
> Mr. Jones. That is true, and that is one reason which impresses me somewhat with the importance

> of limiting the time in which these rates may be suspended. 45 Cong. Rec. 6782. (Emphasis added)

In an earlier debate, Sen. Cummins stated that if, following suspension, "the commission did not decide upon the increased rate, the railway company *would continue to charge its present rate.*" 45 Cong. Rec. 6503, May 19, 1910 (Emphasis added).

Mobil Alaska has earlier demonstrated that both the scheme of the Act and the plain language of § 15(7) preclude its application to the present circumstance of a carrier filing its first and only tariff. It has now conclusively shown that Congress specifically drafted § 15(7) so as to preclude application to a carrier in Mobil Alaska's present position.

At the time that § 15(7) was first enacted, the Commission itself evidenced its understanding that the suspension power was conferred in order to respond to tariff changes. The Commission testified in favor of the proposed legislation in 1910. Chairman Knapp, urging that the suspension period be extended beyond the 60 days of the original Senate bill, stated:

> The next point relates to the suspending of rate *changes*, a subject which is dealt with, beginning on page 17 and line 12. We are of the opinion that the commission should have the power to suspend rate *changes* for a longer period than sixty days, in order that there may be reasonable time for investigation; and especially in view of the fact that no final order after hearing can take effect under the present law until at least thirty days after it is made. 41 Cong. Rec. 6791, May 24, 1910 quoting from Hearings before the Senate Committee on Interstate Commission at 204.

In its 1910 Annual Report the Commission summarized its "authority to suspend proposed *advances* in rates pending investigation of their propriety" as "perhaps the most far-reaching and fundamentally important power conferred upon it." *Annual Report*, 1910, p. 5.

The Commission, upon passage of the Mann-Elkins Act in 1910, understood that it applied only to changes, or more particularly to new rates which replace old rates, regardless of whether particular rates are actually changed. In the 67 years since it was granted the important power to suspend, the Commission has never used it effectively to enjoin the entire operations of a Part I carrier, as it has now suggested it can do in instituting the present suspension proceeding.

4. Case Discussion of the Suspension Power Is Consistent With Its Applicability Only To Changes in Pre-existing Tariffs

The issue squarely raised in this reply, whether the suspension power of § 15(7) can be lawfully exercised to suspend the original and only tariff of a Part I carrier (or such carrier's newly constructed pipeline), has never been presented to a federal court. However, court discussions of the suspension power evidence an understanding or assumption that § 15(7) refers only to tariff changes. The ICC has confronted a circumstance such as that at issue here but one time, according to reported decisions, and, significantly, it did not attempt to exercise the suspension power.

Commission decisions over the past 67 years have occasionally suggested, or even asserted, the existence of authority to suspend initial rates. However these cases are inapposite.

In many cases, the decisionmaker uses the term "initial" rate misleadingly. That is, while the decision states that an "initial" rate was suspended, in fact the carrier had pre-existing rates on file which were affected by the so-called "initial" rate, thus clearly and properly coming within the terms of § 15(7). For example, in *Cotton From New Orleans*, 49 I.C.C. 751 (1918), which is cited in Alaska's Protest/Complaint at 16, the Commission suspended an "initial" rate for shipping cotton by water vessel from New Orleans to New York. The company whose rates were suspended was already servicing this route by way of tariffs covering routes originating before New Orleans to New York, or originating in New Orleans for destinations beyond New York. The Commission had ordered the company to file a separate tariff for New Orleans to New York, a new tariff which clearly affected the pre-existing tariffs on file, within the meaning of § 15(7). The water carrier challenged the Commission's authority to suspend the so-called "initial" tariff, arguing that § 15(7) applied only to *increased* rates. The Commission properly rejected this limited view of § 15(7) and held that the rates at issue were "new" rates within the meaning of § 15(7):

The Commission (Div. 2) stated:

> It is argued that the Commission's suspension power is limited to an increase in rates previously on file and subject to its jurisdiction and, therefore, that it had no authority to suspend the port-to-port rates under investigation. This contention is without merit. Under section 15, paragraph 1, of the act to regulate commerce, the Commission, on its own initiative, whenever it is of the opinion that any rates demanded, charged, or collected are in any way unlawful, may enter upon an investigation, hold full

> hearings, and determine and prescribe just and reasonable rates. Where *new* rates are filed, the Commission, under section 15, paragraph 2, is authorized by similar means to determine the propriety of them, and, pending such determination, to suspend the operation of the schedules stating such new rates. The local rates under suspension in this proceeding applicable to port-to-port traffic were new rates. . . . 49 I.C.C. at 752.

Later in the decision the Commission refers to the "new" or proposed rate as a "proposed change" in the rates on compressed cotton. *Id.* at 753. The Commission went on to determine whether the "new" rate at issue was an "initial" rate for purposes of burden of proof, and determined that in this context the proposed suspended rates "are initial rates, not increased rates." *Id.*

Thus, in regulatory jargon an initial rate may be a changed rate, certainly the term "initial" rate cannot be equated with the term "new" rate used in § 15(7). In fact § 15(7) nowhere refers to "initial" rates. In view of this sometimes confusing and often ambiguous use of the term "initial rate," it is clearly insufficient for protestants, including the Bureau, to cite "initial rate" cases without analysis in support of the proposition that a first and only tariff of a pipeline carrier is properly subject to § 15(7). Most "initial" rate cases involve burden of proof rather than decisions addressing the suspension power.

As an example, Alaska's Protest/Complaint at 18-19 cites *Rail-Water, Grain In Bulk, Missouri, Illinois and Indiana to Buffalo*, 321 I.C.C. 564 (1963), where the Commission had suspended proposed joint rail-water rates for grain. While, as Alaska points out, "the Commission specifically referred to its suspension power with respect to 'initial'

rates at page 566" (Alaska Protest/Complaint at 18), that reference cannot alter the fact that both the railroad and the steamship company, whose joint "initial" tariffs were suspended, had on file at the Commission tariffs covering their respective segments of the proposed "new" joint rail-water rates. As in the *Cotton from New Orleans* decision, *supra*, the steamship company was found to have filed an "initial" rate for purposes of burden of proof, but not for purposes of whether the relevant tariff was properly subject to the suspension power.

In *Bituminous Coal via Motor-Rail from Lynnville, Indiana, to Chicago, Illinois*, 313 I.C.C. 573 (1961), another Commission decision relied upon by the State of Alaska, the issue was also who should have the burden of proof on a proposed motor-rail rate for bituminous coal from Lynnville, Indiana to Chicago, Illinois. Since the decision was concerned with the burden of proof matters it does not clearly state the extent to which pre-existing tariffs were in existence. In any event, the authority of the ICC to suspend the relevant rates was not in issue.

The Bureau cites *Animal Food, Midwest to California, Idaho, and Utah*, 332 I.C.C. 87 (1967) in support of the proposition that the Commission can suspend initial rates. The issue is not whether the Commission can suspend "initial" rates but whether it can suspend the first and only tariff of a carrier. In the *Animal Food* case, the Commission, Div. 2, states:

> In its report the board found that both initial and changed rates were involved, with the changed rates generally reflecting increases. 332 I.C.C. at 88.

The case involves changed rates. In fact, it later refers to the rates under consideration collectively as "the proposed

changed rates." *Id.* at 89. Moreover, like all the cases relied upon by protestants, no challenge to the Commission's authority to suspend was made so no discussion of that power is set forth. Each of the remaining cases cited by the Bureau is inapposite on the same bases as the *Animal Food* decision, *supra*.•

Commission decisions are not always subject to the pitfalls exposed above. In *Coal Rates from Oak Hills, Colo.*, 30 I.C.C. 505 (1914), the Commission evidences an understanding of the term "new" rates as applying to rates affecting pre-existing rates of the same carrier:

> Clearly when the proposed rates involve increases and decreases they are new rates. . . . 30 I.C.C. at 508.

Protestants' assertions notwithstanding, the Commission has confronted the decision whether to suspend a first and only tariff of a Part I carrier in only one reported decision, *In Re Wharfage Charges of the Galveston Wharf Co.*, 23 I.C.C. 535 (1912). There the Commission did not suspend, stating:

> [The tariff in issue] was the first and only tariff of the Galveston Wharf Company on file here, and an order suspending its operation would have left the wharf company without any lawful rates and would therefore have obliged it either to cease its operations or to handle the traffic of the port in violation of the act. We therefore allowed the tariff to go into effect. . . . 23 I.C.C. at 537.

• The cases include Foodstuffs and Agricultural Commodities, California and Arizona to West and South, 329 I.C.C. 321 (1966); Animal Feed from Mississippi and Tennessee to Midwest and Southwest, 316 I.C.C. 94 (1962); Clay from Greybill, Wyoming, to Points in the Middle West, 314 I.C.C. 705 (1961); Machinery from Salt Lake City-International Transport, Inc., 304 I.C.C. 286 (1958). See Bureau Protest and Petition at 12.

While this decision is not cast in terms of whether the Commission had power to suspend such a "first and only" rate, it is a more compelling precedent than any of the decisions cited by protestants because it is the only decision which addresses suspension of a tariff that is clearly *not* a "new . . . rate . . . affecting any rate" under § 15(7). Moreover the *Galveston Wharf* case plainly distinguishes the "first and only tariff" situation quoted above, from subsequently filed tariffs by the Galveston Wharf Company. The first subsequent tariff is referred to as the "new tariff." This "new tariff," which had been filed less than thirty days after the first one, was promptly suspended even though the level of rates it contained scarcely varied from those in the first tariff. Noting that despite its decision not to suspend the first tariff the Commission had instituted an investigation, the Commission continued:

> On April 26 the wharf company filed its tariff No. 2, by the terms of which it proposed to substitute class and commodity rates for the switching charge of $1.75 a car provided in its first tariff. The new tariff by its terms was to become effective on June 9, 1911, but its operation was suspended by our order pending this investigation. *Id.*

The obvious inference from all this is that the Commission would have suspended the first tariff but for the limitation of its suspension power to "new . . . rate(s) . . . affecting any rate. . . ." Mobil Alaska submits that it does not require mere inference to conclude that the Commission's suspension power, granted in § 15(7), does not extend to the "first and only" tariffs of TAPS owners. As in the *Galveston Wharf* case, the Commission can only respond to protests of a first and only tariff by instituting an investigation pursuant to § 15(1).

Decisions by federal courts have not addressed the precise question placed in issue by TAPS protestants. Court discussions of the suspension power simply assume its limitation to tariff changes or evidence an understanding that its application is so confined. For example in *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422 U.S. 289, 296 (1975) ("SCRAP II"), the Supreme Court, reviewing the facts, observes that "ICC declined to exercise its power to suspend proposed rate increases under . . . § 15(7)." 422 U.S. at 296. It later states, that § 15(7) "lodges exclusive power to suspend rate *increases* pending final determination of their unlawfulness." *Id.* at 298. The Court then observes:

> Under the Interstate Commerce Act, the initiative in setting rates remains with the railroads. See SCRAP I. . . . The ICC has the power, after exercise of this initiative by the railroads, and after investigation, either upon its own initiative or upon complaint by an interested party, to declare a rate unlawful if it finds that the rate is unjust, unreasonable, preferential, discriminatory, or otherwise, in violation of the Act. 49 U.S.C. §§ 13 and 15. The ICC, and only the ICC, SCRAP I, *supra,* also *has the power to suspend a new rate for up to seven months pending its determination of unlawfulness.* 49 U.S.C. §15(7). *Id.* at 311 (Emphasis added).

In a footnote to the emphasized statement, the Court demonstrates its understanding that the term "new" rate generally refers to rate increases.

> Failure to suspend does not always do irreparable harm to shippers who pay the increased rates. . . Shippers can always obtain a refund . . . *Id.* at 311, n.13.

In SCRAP I, quoted *ante* at 20-21, it was similarly shown that the Court identifies the term "new" rate with the problem of increased rates suspected to be unjustified. In the first line of that opinion the Court further demonstrates its understanding that suspension applies to changes:

> Under the Interstate Commerce Act, the initiative for rate increases remains with the railroads. But in the absence of special permission from the Interstate Commerce Commission, a railroad seeking an increase must provide at least 30 days' notice to the Commission and the public before putting the new rate into effect. 49 U.S.C. § 6(3). During that 30-day period, the Commission may suspend the operation of the proposed rate.· 412 U.S. at 672.

Quoting *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U.S. 658 (1963), the Court in another instance discussed the suspension power as applicable to changes:

> The Interstate Commerce Commission has the power to suspend proposed rate changes for seven months, while it proceeds to consider the reasonableness of the proposal. "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such period." 49 U.S.C. § 15(7). *Atchison Topeka & Santa Fe R. Co.* v. *The Wichita Board of Trade,* 412 U.S. 800, 820 (1973).

It further observed that:

> [i]n giving the Interstate Commerce Commission power to suspend proposed rate increases, Congress allocated the benefit and harm of a suspension. For a period of up to seven months, the carriers may

> not collect the increases if the Commission suspends them. The income that they might have gained is lost to them forever. Congress did provide protection to shippers for the period after the rate goes into effect. *Id.* at 823.

Protestants' attempt to allocate the benefit and harm of suspension with regard to TAPS tariffs is in dramatic contrast to the above remarks. The Supreme Court, like Congress, is clearly concerned with the harm that denial of the proposed incremental *increases* could work on a carrier subject to a suspension order, evidencing the presumption that transportation services will continue via a pre-existing tariff during a suspension. Protestants, on the other hand, urge an interpretation of the Act that would deprive carriers of all revenues during a suspension period. Cases and commentators consistently view the Act as limiting suspension to changed or, more accurately, "new" rates.* No court authority is available to support protestants' illogical and unjust view of the purpose and effect of § 15 (7). To achieve their purpose in permanently depriving TAPS owners of millions of dollars in revenues without trial or even semblance of due process, protestants are willing to offer an interpretation of the Act that is out of harmony with its overall scheme and sharply at odds with the plain language and undisputed purpose of the suspension provision in § 15(7).

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* See also, I.C.C. *v.* Inland Waterways Corp., 319 U.S. 671 (1943); Manufacturers R. Co. *v.* United States, 246 U.S. 457, 478-9 (1918), Amarillo-Borger Express *v.* United States, 138 F. Supp. 411, 420, fn. 14 (N.D. Tex. 1956); vacated as moot, 352 U.S. 1028. See, Spritzer, Uses of the Summary Power to Suspend Rates: An Examination of Regulatory Agency Practices, 120 U.Pa.L.R. 39, 44-5 (1971); Goodman, The History and Scope of Federal Power to Delay Changes in Transportation Rates, 19 I.C.C. Prac. J. 245 (1959).

B. The Commission is Without Authority to Prescribe Interim Rates

While protestants, to achieve their desired end, must take the position that suspension of a first and only tariff is authorized by § 15(7), they in effect concede that such a solution by itself is unthinkable. In an attempt to remove themselves from the horns of this dilemma, they propose further unlawful exercises of ICC authority.

Suspension in the circumstance presented here is an all-or-nothing proposition. To apply suspension and otherwise remain within the bounds of the Act casts the decision to suspend into a decision whether to allow the pipeline to commence lawful transportation operations. Protestants clearly do not wish to stop the Trans-Alaska Pipeline from moving crude oil. Alaska and the ASRC have enormous financial stake in the pipeline's operation. Thus their interests would be hurt by any delay in TAPS operations. The remaining protestants have no public or proprietary interest in delaying TAPS carriers' operations. Rather they recognize that such effect would be inconsistent with the National Transportation Policy and plainly contrary to the Congressional imperatives of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1651 *et seq.*, Pub. L. 93-153, Nov. 16, 1973, 87 Stat. § 584.

Protestants do not advocate stopping the pipeline. On the contrary, they assume that this simply must not be done. The Bureau, for example, states that suspension must be ordered because TAPS tariffs are unreasonable and then goes on to say: "However, some rates must be filed to permit the pipeline to operate pending the investigation," therefore the Commission must set rates "in order to allow transportation to commence." (Bureau Protest and Petition at 11.) It is only by this skewered thinking that the

Bureau can advance agency prescription of TAPS rates as a solution to the dilemma of the all-or-nothing suspension power. Mobil Alaska submits that the Bureau has it backwards; it is precisely because of the need to preserve transportation services that suspension cannot be construed to apply to TAPS owners' first and only tariffs. It is not the Commission's decision to determine when a carrier will commence its transportation services.

The State of Alaska attempts to sidestep the same basic defect in its position by characterizing in advance any argument by TAPS owners that suspension would stop the pipeline as an attempt to intimidate the Commission unfairly. It argues, like the Bureau, that by allowing the Commission to set "lawful tariffs" the dilemma is solved. It goes further than the Bureau, however, by asserting that the instant proceedings are sufficient to determine "reasonable and lawful tariffs in place of those which should be suspended." (Alaska Protest/Complaint at 20). Accusations cannot substitute for legal analysis. Moreover, it is patently absurd to suggest that the full hearing required by § 15(1) can be condensed into the present summary context.

Having backed themselves into a corner by advocating suspension of original TAPS tariffs, protestants seek escape by urging the Commission to set interim rates at substantially reduced levels. This flies in the face of long-settled law arising from the plain requirements of § 15(1). The Commission cannot set rates until it first has conducted an adjudicatory hearing, providing full discovery and evidentiary rights to all interested parties, and second, based on the evidence adduced therein, has made a determination that the carrier-initiated rate is unlawful under the standards of the Act. Courts and commentators confronted with the apparent all-or-nothing result of the suspension

power in certain circumstances have recognized that it presents no dilemma but reveals the limits of the Act. For example, in Spritzer, *Uses of Summary Power to Suspend Rates,* 120 U. Pa. L. R. 39 (1971), the author, who advocates in favor of power in a rate-making agency enabling it to set interim rates, takes the law as he finds it. Speaking of the rate-making and suspension authority of the C.A.B., F.P.C. and I.C.C., he states:

> It is suggested that in such circumstances it would be permissible to grant rate relief during the course of a formal proceeding by an interim order based on interim findings. Existing statutory provisions, however, lack flexibility. An agency has discretion to suspend in toto or not at all. But there is no provision for the common situation in which an agency can make a preliminary judgment that a proposal appears justifiable in part and questionable in part. *Id.* at 43.

The solution to the problem of lack of flexibility is obvious, since the problem is the statute, the solution is legislative.

> An expeditious and satisfactory means of meeting such a situation would be for Congress to authorize rate-making agencies to allow partial and temporary increases, subject to appropriate conditions, at the time they exercise their power of suspension. *Id.*

Courts have similarly identified the problem of the all-or-nothing suspension as one arising from the limits of the statute and not from the perfidy of the regulated carrier. *Moss* v. *Civil Aeronautics Board,* 430 F. 2d 891 (D.C. Cir. 1970).

Protest Reply of Mobil Alaska.

1. Section 15(1) Requires the Commission to Conduct a Full Evidentiary Hearing Before It Can Prescribe Rates

Before the Commission may lawfully prescribe a tariff, it must provide the carrier a full hearing and, on the basis of the record adduced, determine that the carrier-initiated rate "is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial. . . ." 49 U.S.C. § 15(1).

In determining whether a carrier-established rate is unreasonable, the Commission acts in a quasi-judicial capacity. *Morgan* v. *United States,* 298 U.S. 468 (1936); *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.,* 227 U.S. 88 (1913). *Cf., United States* v. *Florida East Coast Railway Co.,* 410 U.S. 224 (1973). This function contrasts sharply with the Commission's summary powers to order suspension. *E.g., Arrow Transportation Co.* v. *Southern Railway Co.,* 372 U.S. 658, 671-72 (1963); *Port of New York Authority* v. *United States,* 451 F.2d 783 (2d Cir. 1971). While the power to suspend rates augments the greater power to prescribe rates, this scheme cannot be viewed backwards to allow the power to prescribe rates to mitigate the effects of the power to suspend. The Commission is without authority to cancel carrier rates on a summary finding of unreasonableness. *North Carolina Natural Gas Corp.* v. *United States,* 200 F. Supp. 745, 749 (D. Del. 1961).

The Supreme Court has left no doubt that the "full hearing" required by § 15(1) includes, *inter alia,* the due process requirements of the right to be fully apprised of the evidence submitted or considered, the opportunity to conduct discovery and offer evidence by way of explanation or

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rebuttal. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co., supra.** In addition, the Court has directed that where a "full hearing" is a predicate to the finding of unreasonableness which triggers the power to set rates,

> [t]here must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. [citation omitted]. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order.
>
> • • •

* In so holding, the Court merely recognized the clear congressional intent embodied in § 15(1). Indeed, the congressional debate concerning whether to provide the Commission with the power of suspension left no doubt as to what was intended by the full hearing requirement of § 15(1). Speaking in support of the proposed suspension power, Senator Cummins described the requirements of such a hearing:

> . . . a hearing is required in every instance in which the commission seeks to set aside a rate established by the [carrier]. . . . Testimony is taken, arguments are presented, and at the end of such a proceeding the Interstate Commerce Commission either condemns the rate and prescribes another in its stead, or it dismisses the complaint.
>
> It is idle for anyone to assert that the commission can at any time set aside a . . . rate. The law as it is proposed in this bill does not change that in the slightest degree, except to give the commission the power to initiate this proceeding upon its own motion. But all the subsequent steps must be taken precisely as though it had been initiated upon complaint. I want that to settle firmly in the minds of Senators. It would not be tolerable even if it were the law that the commission could set aside rates simply upon a suggestion and without any inquiry whatever. 45 Cong. Rec. 6501 (1910).

> The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the triers of facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. *Morgan* v. *United States, supra,* 298 U.S. at 480.

In addition to the above-mentioned minimum procedural rights necessary to satisfy the full hearing requirement of § 15(1), the Commission's General Rules of Practice, 49 C.F.R. Part 1100, afford parties substantial additional rights which are necessary to the exercise of a carrier's right to a full hearing. A party to a proceeding before the Commission may serve interrogatories (Rule 62), requests for admission (Rule 63), and, upon order by the Commission, take depositions upon oral examination (Rule 58) and inspect and copy documents (Rule 66). If Mobil Alaska's right to offer evidence in explanation or rebuttal is to be meaningful it must be afforded these pre-hearing discovery rights.*

Finally, Respondent's right to a full hearing before any Commission determination of the reasonableness of its tariffs includes the right of ultimate judicial review of an

* The Bureau of Investigation and Enforcement would have the Commission blatantly violate its own Rules of Practice, Rule 57, by ordering production of documents within the context of an informal suspension hearing and further by conditioning the right to refile after suspension on both the immediate production of some documents and an agreement to produce others within 30 days. Bureau's Protest and Petition at 9.

adverse Commission order. Pursuant to 5 U.S.C. § 702 and 28 U.S.C. §§ 2321(a), 2342, Mobil Alaska has a statutory right to secure a judicial determination of whether an order pursuant to § 15(1) exceeded the Commission's constitutional or statutory authority, was based on insufficient evidence, was arbitrary or capricious or otherwise unlawful. 5 U.S.C. § 706. Judicial review of suspension decisions is extremely limited.

In a suspension proceeding pursuant to § 15(7), the Commission's decision is governed by informal procedures drastically different from those necessary to comply with due process and the full hearing requirement of § 15(1). The statute itself makes this quite clear by authorizing the Commission to act "at once," with reasonable notice to affected carriers, but without formal pleadings, to suspend the proposed changes in tariffs. This practice is distinguished in § 15(7) from the full hearing required by § 15(1) by the additional proviso that if such a proceeding has not been completed within the suspension period, the rate change may be effectuated. In addition, Commission Rule 200, 49 C.F.R. § 1100.200, contemplates an informal hearing, without preparation of a transcript, and Rule 57 specifically precludes use of normal discovery devices in hearings governed by Rule 200. Moreover, the decision whether or not to suspend is a discretionary act which is reviewable only to determine whether the order exceeds the Commission's authority, *United States* v. *Chesapeake and Ohio Railway Co.*, 426 U.S. 500 (1976), or constitutes a gross abuse of discretion. *Naph-Sol Refining Co.* v. *United States,* 269 F. Supp. 530 (W.D. Mich. 1967). A suspension hearing does not and cannot satisfy the statutorily-mandated full hearing, which is a necessary prerequisite to Commission establishment of a rate. *Arrow Transportation Co.* v. *Southern*

Railway Co., 372 U.S. 658, 671-72, *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 749 (D. Del. 1961); *Bison Steamship Corp.* v. *United States*, 182 F. Supp. 63, 67 (N. D. Ohio 1960).

Thus, each of the statutory rights discussed above would be denied Mobil Alaska by a Commission decision to summarily suspend for purposes of unlawfully imposing a lower rate. First, Mobil Alaska would be denied the long-recognized right of initially setting its rate. Second, it would be denied its statutory rights to a full hearing before its rate is set aside as unreasonable by the Commission. Third, it would be denied the important procedural rights inherent in the "full hearing" requirement of § 15(1) under which it could determine the evidence on which a decision was based and offer evidence in explanation and rebuttal. It would be denied opportunity to present any adverse ruling to a court for meaningful judicial review.

2. A Conditional "No-Suspend" Order Would Constitute Commission Prescription of Rates

Protestants request that the Commission enter an order which suspends carrier-initiated rates over the Trans Alaska Pipeline System, but grants permission to the carriers to refile on one day's notice at a lower-rate level to be indicated by the Commission with assurance that new tariffs would not be suspended. Protestants necessarily describe such an order as one done on a permissive basis, seeking to inject connotations of voluntariness into the act of refiling tariffs pursuant to such an order. To companies like Mobil Alaska, with no source of revenue but TAPS operations, the choice between not operating and operating at a rate level lower than its own business needs require is no choice at all. To view acquiescence in conditional no-suspend order

as voluntary or in any way consistent with the Act's commitment to carrier-initiated rates would be engaging in fantasy. While the law engages in many legal fictions, it does not stoop to this sort of regulatory blackmail. As stated in *SCRAP* v. *United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd on other grounds*, 412 U.S. 669, (1973):

> [a] suspension decision which effectively blackmails the carriers into submitting agency-authorized rates is functionally indistinguishable from an agency order setting those rates. . . . 346 F. Supp. at 197.

The Commission is not at liberty to evade its statutory mandate and its own procedures by exacting a rate through severe economic pressure. This is the message of *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970). In a factual circumstance strikingly like the one posited by protestants' requests for relief, the Court of Appeals for the District of Columbia rejected a conditional no-suspend order as unlawful. Major air carriers, subject to a statutory scheme identical in relevant part to the Interstate Commerce Act, filed across-the-board rate increases at the CAB. Upon oral argument scheduled on its own motion the CAB entered an order suspending the rates. However, recognizing the carrier's need for increased revenue, the Board outlined a tariff formula which it would allow to be implemented without suspension. Carriers immediately withdrew their proposed tariffs and filed new ones conforming to the Board's formula. In ensuing litigation, the CAB defended its action as mere suggestion. It contended that so long as rates were not specifically ordered, they remained carrier-made rates. The court rejected the Board's contention and found that in the face of the carrier's urgent need for additional revenue, the threatened use of the Board's power to sus-

pend rates in excess of the "suggested" ones constituted economic coercion and prescription of rates by the Board. Further, the court invalidated the tariffs as unlawfully adopted in violation of the statutory requirements of notice and hearing over the Board's objection that such action would "hobble the administrative process." *Id.* at 900.

Other courts have recognized the potential for economic coercion behind such agency "suggested rates." In *National Association of Motor Bus Owners* v. *Federal Communications Commission*, 460 F.2d 561, 567 (2d Cir. 1972), the court stated:

> In *Moss*, therefore, the airlines' "discretion" was so circumscribed as to have been almost nonexistent. The situation was not such that the airlines in fact had an option to choose between alternatives.

The same kind of coercive use of the agency's suspension power was at issue in *Delta Air Lines* v. *CAB*, 543 F.2d 247 (D.C. Cir. 1976), although in that case the CAB had used its power to prescribe tariff regulations rather than tariff rates.

The Bureau recognizes the applicability of *Moss* to the course of action it suggests. To avoid its effect the Bureau makes the incredible suggestion that if the Commission merely takes the transparent, ineffectual additional step of specifically stating that it is not prescribing a rate within the meaning of *Arizona Grocery* v. *Atchison Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932), it can avoid the "procedural problems" of *Moss* v. *CAB*. This suggestion ignores not only the fact that *Arizona Grocery* constituted the main line of the CAB's unsuccessful defense in *Moss* v. *CAB*, but also that the entire thrust of *Moss* and its progeny is that courts will look through the form of agency action

to discover its substance. A self-serving declaration to the effect that the Commission is not prescribing a rate will not cloak the fact that the Commission, through the combined effects of its purported suspension power and economic coercion, will have supplanted carrier-established rates with agency-prescribed ones without conducting the full hearing upon which such action must be predicated.

Other aspects of protestants' scheme to lower the TAPS tariffs via Commission order remain unclear and are difficult to square with the requirements of the Act. It is not clear, for example, whether protestants intend the new rates to remain in effect permanently or only during the statutory suspension period, nor is it clear whether the formal investigation which would be instituted is intended by protestants to examine the carrier-initiated rate or the refiled rate. The Bureau takes the amazing position that once a TAPS owner succumbs to the economic lever of suspension, any resulting investigation would examine the refiled Commission-prescribed rate. Under this perverse view of regulatory justice, TAPS carriers unable to face total loss of revenues for seven months would be wholly deprived of any opportunity to defend its own rate. The Bureau also seeks to impose a refund obligation on the refiled tariffs, but avoids confronting the inconsistency of this request with the statutory bar to reparations from Commission-prescribed or approved rates.

The Commission, in sum, must not grant protestants' requests. The requisite statutory authority is clearly lacking, and the projected results of any such action would be so bizzare as to strongly suggest a regulatory quagmire of unrivaled dimension.

II

SUSPENSION OF MOBIL ALASKA'S TAPS TARIFF WOULD BE A DENIAL OF DUE PROCESS

Should relief as requested by protestants be ordered, Mobil Alaska would suffer irretrievable loss of property without the protections guaranteed by the Constitution. Suspension and prescription of new rates on an interim basis will result in the immediate loss of millions of dollars on the basis of a summary proceeding. The minimum protections of the Due Process Clause require much more than these summary proceedings can provide.

A suspension of TAPS owners' tariffs, with or without a condition permitting operations at substantially lower rates, would severely penalize TAPS carriers on ground that their rates are presumptively unlawful. This drastic result would be achieved by consideration of allegations untested by the procedures which could expose a factual basis for decision.

Assertions that the Commission's authority pursuant to § 15(7) allow a suspension in the present circumstance cannot provide escape from the procedural rights conferred by § 15(1). Mobil Alaska's protection against the loss which is threatened by grant of protestants' request is not dependent upon matters of statutory construction. The statutory right to a full hearing merely captures constitutional rights which exist apart from the language of the Act. The Supreme Court early articulated the constitutional basis of § 15(1) in *Interstate Commerce Commission* v. *Louisville-Nashville R. Co.*, 227 U.S. 88 (1913). There the Court praised procedures exposing facts as necessary to foreclose arbitrary exercises of government authority:

> [Section 15(1)] gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct [that a Commission determination is conclusive], it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power. 227 U.S. at 92.

No evidence will form the basis for a decision to lower TAPS owners' revenues via the suspension powers of § 15(7). Mobil Alaska will have no meaningful opportunity to confront its challengers with its own extensive evidence in support of its rate making, nor will it be able to illuminate that evidence with the testimony of experts critical of the new methodologies and economic theories advanced by protestants. The basis of protestants allegations will not be proffered and tested by cross-examination. If an order effectively sets a rate, it is effectively a finding of unlawfulness; such order would be constitutionally defective without a fair opportunity to meet the case against it by means of cross-examination and rebuttal evidence. *Southern Ry. Co.* v. *Virginia*, 290 U.S. 190 (1933). As

stated in *Chicago, Milwaukee & St. Paul Ry Co.*, 134 U.S. 418 (1890),

> The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. 134 U. S. 458.

The plain effect of a suspension or prescription of interim rates in the present circumstance is identical to a finding of unlawfulness under the Act. Characterizing such decision as a suspension rather than a finding of unlawfulness cannot, however, avoid meeting the obligations of the due process clause. The form of an administrative action cannot avoid the requirements of due process. *Morgan* v. *United States*, 304 U. S. 1 (1938); *KFC National Management Corp.* v. *N.L.R.B.*, 497 F.2d 298 (2d Cir. 1974), *cert. denied*, 423 U. S. 1974 (1976); *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959); *Philadelphia Co.* v. *United States*, 175 F.2d 808 (D. C. Cir. 1948),

vacated on joint motion of counsel as moot, 337 U. S. 901 (1949).

Certainly, the prospect of a formal investigation and hearing commencing after the effects of the conclusive suspension order were felt would neither mitigate nor cure the violations incurred. Prior notice, hearing, and preparation of a reviewable record are fundamental rights embodied in the due process clause. *North American Van Lines, Inc.* v. *United States*, 412 F. Supp. 782 (N. D. Ind. 1976). A hearing required as a prerequisite to action means a hearing prior to determination; hearing after determination is made is insufficient. *Civil Aeronautics Board* v. *Delta Airlines*, 367 U. S. 316, 331 n. 13 (1961).

The Bureau's request that a suspension-order be conditioned on imposition of a burdensome discovery obligation highlights protestants' backward approach to evaluation of TAPS rates. This massive amount of factual evidence sought by the Bureau to formulate its case against the carrier-initiated TAPS rates is precisely that which should form the basis of the order. However, the Bureau's request would concede the absence of such evidentiary basis in the very order itself.

Moreover, without such factual evidence in the record, meaningful review of an agency order is foreclosed. Without the record of a hearing, there is nothing to review for conformity to the evidence or for conformity to statutory standards. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965); *ICC* v. *J-T Transp. Co.*, 368 U. S. 81 (1961). Thus, in *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156 (1962), the Supreme Court invalidated an order of the interstate Commerce Commission which did not sufficiently disclose the grounds of the action taken with the following words:

> The Commission must exercise its discretion within the bounds expressed by the standard 'public convenience and necessity'. And for the courts to determine whether the agency *has* done so, it must disclose the basis of its order and give clear indication that it has exercised the discretion with which Congress has empowered it. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. 371 U. S. at 167-68.

The sum of the protestants' arguments to the Commission boil down to the proposition that the tariffs here are unreasonable and will be found to be so upon full investigation; therefore, any power which the Commission could exercise before a full adjudicatory hearing may be exercised now. It is an argument of expediency to obtain the fruits of a prejudgment of issues which necessarily will take months to fully explore. While protestants exhibit few qualms over the inequity of the relief which they seek, they ignore formidable statutory and constitutional barriers to the course of action they propose. The primary damage claimed by protestants from denial of their requested relief is private harm, unrelated to the concerns of the Commission's statutory charter. Even if a public interest factor corresponding to the potential harm to Mobil Alaska were present, it could not override constitutional guarantees. Similarly, if the present circumstances are viewed as unique and outside the situations contemplated by the Act, a perceived need for change cannot be effected by administrative recodification. "[D]ue process in administrative hearings does not yield to administrative 'convenience or expediency, or because of a natural desire to be rid of harrassing delay. . . .'" *Fitzgerald* v. *Hampton*, 467 F.2d 755, 767 (D. C. Cir. 1972, *quoting Ohio Bell Telephone Co.* v. *Public Utilities*

Commission of Ohio, 301 U. S. 292, 305 (1937). Due process requires that a full and fair adjudication of the challenged TAPS tariffs be conducted before the confiscatory action sought by protestants lawfully could be ordered.

CONCLUSION

The Commission should respond to the allegations set forth in the protests by immediately instituting a formal hearing. The Commission cannot, however, grant the suspension relief requested, nor fashion an order achieving lowered TAPS rate levels without exceeding its statutory authority and violating Mobil Alaska's constitutional right to due process of law. The protests should be denied in all respects.

Dated: June 22, 1977

Respectfully submitted,
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Reply of Exxon Pipeline Co. to Protests, June 22, 1977.

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

EXXON PIPELINE COMPANY,
LOCAL TARIFF, I.C.C. No. 125

Rates Applying In The Transportation Of Petroleum Through The Trans Alaska Pipeline System And Loading In Vessels For Destinations Outside Alaska

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REPLY OF
EXXON PIPELINE COMPANY TO PROTESTS

[Caption Omitted in Printing]

Protest Reply of Exxon Pipeline.

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

WASHINGTON, D.C.

EXXON PIPELINE COMPANY
LOCAL TARIFF, I.C.C. No. 125

Rates Applying In The Transportation Of Petroleum Through The Trans-Alaska Pipeline System And Loading In Vessels For Destinations Outside Alaska.

REPLY OF EXXON PIPELINE COMPANY TO PROTESTS

Exxon Pipeline Company (Exxon) submits the following as its reply to the protests and petitions for suspension of its initial interstate rate filed for transportation through the Trans-Alaska Pipeline System:

PRELIMINARY STATEMENT

Exxon owns an undivided twenty percent (20%) interest in the Trans-Alaska Pipeline System (TAPS), a pipeline system constructed to transport crude oil some 800 miles from Prudhoe Bay to Valdez, Alaska. On June 8, 1977, pursuant to Sections 1 and 6 of the Interstate Commerce Act (the Act), Exxon filed a tariff schedule setting forth an initial rate of $6.27 per barrel to apply to the transportation of crude oil through its portion of TAPS.

The seven other joint owners have also filed tariffs of initial rates. The following table lists all of the joint owners, their respective interests in TAPS, their I.C.C. tariff numbers, and their proposed initial rate per barrel:

Protest Reply of Exxon Pipeline.

TABLE 1

Joint Owners of TAPS and Proposed Rates

Carrier	Interest in TAPS	I.C.C. Tariff No.	Proposed Initial Rate per Barrel
Amerada Hess Pipeline Corp.	1.50%	1	$6.44
ARCO Pipe Line Co.	21.00	1030	6.04
BP Pipelines, Inc.	15.84	2	6.35
Exxon Pipeline Co.	20.00	125	6.27
Mobil Alaska Pipeline Co.	5.00	2	6.31
Phillips Alaska Pipeline Co.	1.66	2	6.22
Sohio Pipe Line Co.	33.34	742	6.16
Union Alaska	1.66	2	6.09

On June 15, 1977, protests and petitions for suspension and investigation were filed by the State of Alaska (Alaska), the Arctic Slope Regional Corporation (ASRC), the United States Department of Justice (DOJ), and the Commission's Bureau of Investigations and Enforcement (Bureau). Each of these protestants contends that each of the rates filed is excessively high in violation of Section 1(5) and other provisions of the Act and should be suspended and investigated. Each protestant, while contending that the rates as filed should be suspended, states that the TAPS carriers should be given special permission to file, on one day's notice, tariffs containing substantially lower initial rates. The range of reduced initial rates per barrel proposed by the protestants is as follows:

Protest Reply of Exxon Pipeline.

TABLE 2

Protestants' Proposed Reduced Rates

Protestant	Range (per barrel)	Rate Proposed for Exxon
State of Alaska	$3.59-$4.42	$3.80-$3.99
Arctic Slope Regional Corp.	$3.04-$3.44	$3.27
Department of Justice	$4.40-$4.60	$3.88-$4.49
Bureau of Enforcement	$4.54-$5.00	$5.00

These proposed initial rates are as much as $3.00 per barrel lower than those proposed by the TAPS carriers, including Exxon.

As a general proposition, the protestants rest their proposed initial rates on unique standards of pipeline ratemaking which are not employed by the pipelines themselves or by this Commission. Moreover, each protestant, with the exception of the Bureau, either directly or indirectly challenges the Commission's existing methodology for determining the valuation of pipeline property and for examining the reasonableness of pipeline rates in light of the resulting rate of return on such valuation.

It is the position of Exxon that the various protests and petitions for suspension and investigation filed with respect to its proposed initial rate should be summarily denied and the proposed initial rate allowed to become effective as scheduled. The rate calculations made by the individual protestants to support their respective proposed initial rates are, for the most part, based on assumptions and principles foreign to the Commission's methodology for pipeline ratemaking. Issues involving the Commission's valuation methodology for common carrier pipelines are already before the Commission in Ex Parte No. 308, *Valuation of Common Carrier Pipelines.* To the extent that any

of the protestants challenge or attempt to modify existing Commission doctrine on these issues, their protests are clearly beyond the scope of this proceeding and should be ignored.

The reduced rates proposed for Exxon by the protestants would reduce the revenues received by Exxon to such an extent that its participation in the operation of TAPS would be financially indefensible. Moreover, while the shippers are fully protected from overcharges by the provisions of the Act, if the Commission were ultimately to conclude that Exxon's rate was in fact a proper rate, Exxon could never recover the revenues lost by interim application of a reduced rate. Exxon and the other owners of TAPS participated in the Trans-Alaska project with the expectation that once the project was completed, they would be able to recover a fair return on the enormous sums of money they had invested. The approach and the rates advocated by the protestants herein would result in serious financial losses for the owners of TAPS, and, at the same time, discourage further energy initiatives by the joint owners and other companies.

The only responsible decision which the Commission can make is to allow the rates as filed to go into effect, subject to investigation, if required. To decide otherwise would be unfair to the carriers involved herein and harmful to the public interest. The rate proposed by Exxon is fully justified and the protests against that rate have no factual basis or legal support, as the following discussion shows.

ARGUMENT

I. The Circumstances Surrounding TAPS Compel the Commission to Refuse to Suspend the Initial Rates Filed by the TAPS Owners

A. The Commission Should Not Exercise Its Suspension Power Unless Proposed Rates Are Shown To Be Clearly Unlawful

The Supreme Court has recently described the Commission's suspension power in the following terms (*United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500, 512-513 (1976)):

> "The power to suspend the proposed rates pending investigation—the regulatory tool at issue here—was added to the Interstate Commerce Act by the Mann-Elkins Act of 1910, 36 Stat. 552. Its purpose was to protect the public from the irreparable harm resulting in unjustified increases in transportation costs by giving the Commission 'full opportunity for . . . investigation' *before* the tariff became effective. It provided a 'means . . . for checking at the threshold new adjustments that might subsequently prove to be unreasonable or discriminatory, safeguarding the community against irreparable losses and recognizing more fully that the Commission's essential task is to establish and maintain reasonable charges and proper rate relationships.' 1. Sharfman, *The Interstate Commerce Commission* 59 (1931). The exigencies of competition, seasonal and other demand trends, and the influences of the general economy over a seven-month period can make implementation of this suspension mechanism a particularly potent

> tool. That potency was well recognized, even at its creation. Senator Elkins referred to it as a 'tremendous power.' Senator Cummins characterized it as 'an order in the nature of a preliminary injunction'. . . ." (footnotes deleted)

As a "particularly potent tool," suspension must be exercised judiciously and only when the Commission is convinced that the rates are in fact unjust and unreasonable.[1]

B. Initial Rates Are Presumed To Be Lawful

When an initial rate is filed by a carrier, the burden of proof is upon protestants to show why that rate should not be allowed to become effective. As the Commission long ago held:

> "[C]arriers are authorized to establish, in the first instance, their transportation charges, and the presumption of right doing attaches to their acts in the establishment of those rates." *Banner Milling Co.* v. *New York Central & Hudson R.R.*, 14 I.C.C. 398 (1908).[2]

1. As noted above, the suspension of rates has been characterized as "an order in the nature of a preliminary injunction." *United States* v. *Chesapeake & Ohio R. Co., supra,* 426 U.S. at 513 (1976). Thus, exercise of the Commission's suspension power should rest upon a showing (1) that the protestant will ultimately prevail in its contention that the rate is unlawful (2) that the protestant will be irreparably injured if the rate is not suspended, (3) that suspension will not cause harm to others, and (4) that the public interest is served by suspension. *Virginia Petroleum Job. Ass'n* v. *Federal Power Comm'n*, 259, F.2d 921, 925 (D.C. Cir. 1958).

2. Regarding the presumption of good faith and proper conduct by carriers filing rates, *see West Ohio Gas Co.* v. *Ohio Pub. Util. Comm'n*, 294, U. S. 63, 72-73 (1935) and *Interstate Commerce Comm'n* v. *Chicago Great Western R. Co.*, 209 U.S. 108, 119-120 (1908) ("The presumption of honest intent and right conduct attends the action of carriers . . . These presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers.").

More recently, the Commission clarified the difference between the burden of proof in a proceeding involving a "changed" rate and one involving an initial rate:

> "Of particular significance are the express terms found in sections 15(7) and 307(g). Each provides for suspension and/or investigation of ' . . . a new rate . . . ' which encompasses both changed and initial. However, each section places the burden of proof upon the proponent of only a 'changed' rate. The distinction between the meaning of the two terms becomes readily apparent from the excepted provisions of section 307(g) which 'shall not apply to any *initial* (emphasis added) schedule filed prior to October 1, 1941 . . . ' Further support for this distinction is found in section 307(i) relating to water contract carriers . . . [W]ithin the entire statutory framework, there is consistently recognized an express difference between an 'initial' and a 'changed' rate, and express identification of the parties upon whom the burden of proof falls. Such is consistent also with the provisions of section 7(c) of the Administrative Procedure Act, whereby the proponents of an order such as the protestants of an 'initial' rate proposal, have the burden of proof." *Rail-Water, Grain In Bulk, Mo., Ill., And Ind. to Buffalo,* 321 I.C.C. 564, 566-567 (1963).[3]

3. For other Commission decisions holding that the burden of proof is on the parties protesting initial rates, *see Bituminous Coal, Motor-Rail, Lynnville, Inc., To Chicago,* 313 I.C.C. 573, 574 (1961); *New York Central R. Co., Station At Jay Street Terminal,* 310 I.C.C. 211, 212 (1960); *Cotton From New Orleans,* 49 I.C.C. 751, 753 (1918); *Bay State Milling Co.* v. *Transit Corp.,* 43 I.C.C. 338, 347 (1917).

Thus, the suggestion in the Department of Justice's protest (pp. 8-9), that the burden of proof in this suspension proceeding is somehow on the pipeline carriers is simply wrong. Before the Commission can suspend the initial rates filed by Exxon and the other joint owners, it is the protestants who must overcome the presumption that those proposed rates are lawful. As the following sections of this Reply will show, the protestants have failed to sustain this burden.

C. Suspension Of Exxon's Initial Rate Would Be An Abuse Of Commission Discretion

The core issued in this proceeding is not whether the Commission, after a hearing, may find that the proposed initial rate filed by Exxon requires adjustment, but whether the Commission should now exercise its discretionary power to suspend that rate. The Commission's decision must take into account and must reflect a balancing of equities among the pipeline carrier, the oil producers, the refineries, the public, and the State of Alaska.

Exxon submits that when the Commission has properly balanced all of these interests and has considered all of the circumstances its decision must be that it will not exercise its suspension power. To decide otherwise would be a gross abuse of the Commission's discretion.

The consequences to the TAPS carriers, the oil producers, and the public which would flow from a decision to suspend the rates of the TAPS carriers are so staggering that they simply must not be permitted to happen. As the Bureau frankly admits in its Protest (p. 35), a suspension of these initial rates "does not merely postpone increases, but rather stops all operations, and hence some rates must be allowed."

As discussed below, under its suspension powers the Commission options are limited to permitting the rates filed to go into effect or suspending such rates; it has no power to prescribe a different rate absent a full hearing. Accordingly, if the rates are suspended, the TAPS carriers will be deprived of revenues (in excess of $7 million per day at full operation) during the period of the Commission's investigation; in addition, they would be forced to incur the very sizable expense of maintaining the pipeline system on a standby basis. Similar consequences would be visited upon the oil producers who would be required to terminate production, yet maintain their facilities on a standby basis.

If the oil does not flow through the pipeline, substantial losses will also be experienced in respect to the vessels now scheduled to call at Valdez. A significant marine fleet has been organized to transport crude oil from Valdez to the lower forty-eight states. Many of these vessels are either firmly scheduled to call at Valdez or are in shipyards being converted to Alaskan crude service and cannot readily be diverted or outchartered to other uses. For the most part, these vessels would either be on nonproductive standby or would have to be repositioned at substantial cost.

West Coast refineries also will be seriously affected by suspension of the TAPS rates. Due to the lead time for arranging supplies of crude oil, some West Coast refineries have terminated existing supply arrangements in anticipation of receiving crude oil from Alaska's North Slope. If deliveries of that oil are delayed, there is a serious risk that some of these refineries will exhaust their supplies of crude oil before temporary crude supplies can be obtained from other sources.

A decision to suspend the rates of the TAPS carriers, will thus halt the production of crude oil which would other-

wise reduce significantly the amount of oil imported into the United States. When TAPS is operating at current design capacity the Nation's balance-of-payments deficit will be reduced by some $16 million per day. In addition, the State of Alaska, which ironically has asked that the rates be suspended, will lose royalty and tax revenues during the period of investigation seriously affecting its budgetary processes.

These serious and irreparable consequences flowing from a decision to suspend must be weighed against the adverse effects of a decision *not* to suspend. The only arguably adverse consequences of that decision are that shippers of crude oil from Alaska's North Slope will, in the first instance, be assessed transportation charges at a rate higher than protestants claim that they should be and that the State of Alaska will receive royalties calculated on the basis of a per barrel value lower than the State would like to have. But even if protestants, after a hearing, should sustain their contentions that the rates of the TAPS carriers are excessive, these interim effects of the application of the rates as filed are not irreparable.

Shippers and other affected parties have available the option of filing a complaint under section 13 of the Act, 49 U.S.C. § 13, and seeking reparations under section 16, 49 U.S.C. § 16, in the event that the TAPS carriers' rates are found to be too high. The TAPS carriers and the Commission are currently in the preliminary stages of the statutory valuation process during which the Commission will present a tentative valuation of each carrier's property, subject to protest by any interested party within 30 days (49 U.S.C. § 19a (h). If the tentative valuation is protested, the Commission must hear and consider any evidence in support of the protests and it may make any changes in its valuation

it deems necessary before the valuation becomes final (49 U.S.C. § 19a(i)). Section 19a(i) provides that:

> "All final valuations by the commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under this chapter as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of this chapter, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Thus, it is clear that the various protestants should present any evidence they have regarding the TAPS carriers' rate base in the valuation proceeding which will soon be forthcoming and not in this suspension proceeding. If the protestants find the Commission's tentative valuation objectionable and are successful in changing the final valuation, that final valuation will serve as prima facie evidence in any investigation of the propriety of the filed rates and in any proceedings for the recovery of reparations for overcharges.

An examination of the Commission's procedures for determining valuation, investigating rates, and awarding reparations clearly shows that the protestants herein will be fully protected by allowing the carriers' initial rates as filed to become effective as scheduled. The protestants will have the opportunity to challenge the valuation rate base in the valuation proceeding and the rate of return on valuation in any investigation of the proposed rates.

In the Trans-Alaska Pipeline Authorization Act, the Congress has declared that the "early development and delivery of oil and gas from Alaska's North Slope to domestic

markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources" and that the earliest practicable delivery of extensive reserves of low-sulfur oil from the North Slope "will best serve the national interest" (43 U.S.C. § 1651).

In light of the foregoing, a decision by the Commission to suspend the rates of the TAPS carriers would be wholly irresponsible and a flagrant abuse of its discretion unless the Commission is convinced beyond all doubt and decides that those rates are in fact unlawful on their face. The Commission cannot make that decision, since, as discussed below, the rate filed by Exxon was developed in the manner by which the Commission has traditionally calculated pipeline rates and is manifestly reasonable when tested by any proper standard.

II. Exxon's Initial Rate Was Constructed In Accordance With Established Commission Practice

The Commission's role in this suspension proceeding is relatively simple. In exercising its discretion to suspend or not suspend, all that this Commission should do is to examine the rate filed by Exxon to determine whether or not that rate has been established in accordance with the practices conventionally accepted by this Commission. If it has been, the Commission should refuse to suspend the rate leaving the protestants and other affected parties to pursue their remedies under the Act.

As discussed below, this Commission has already ruled that far-reaching changes in the way in which pipelines are regulated, and which have an industry-wide impact, are not the proper subject for an individual pipeline rate proceeding, even in the course of a full investigatory hearing.

Clearly then, such matters are wholly inappropriate in a suspension proceeding. Similarly, as discussed more fully below, complex factual questions, such as those raised concerning construction costs and practices in the Arctic, are properly the subject of full investigation in a valuation proceeding or a rate investigation and cannot be dealt with in the context of a suspension proceeding.

In the case of Exxon's $6.27 rate, the Statement of Ernest C. Terry, filed herewith as Appendix A, shows that this rate was not only constructed in accordance with the standard practices employed by this Commission and the regulated pipelines, but that the rate is actually less than could have been justified.

As Mr. Terry's statement shows, Exxon's rate is based on an estimated valuation for TAPS, employing the valuation methodology described by Jesse C. Oak, Senior Valuation Engineer, Bureau of Accounts, of the Interstate Commerce Commission, in his testimony in Ex Parte No. 308, dated March 25, 1977. The estimated valuation employed for Exxon's 20% share was $1,976,500,000.

In arriving at this valuation, Mr. Terry used original cost figures which were supplied by Alyeska Pipeline Service Company to the Interstate Commerce Commission, even though later estimates would indicate that the original cost will be somewhat higher. Cost of reproduction-new was estimated through use of indices of the kind regularly employed by the Valuation Section of the Commission.

In constructing an initial rate, Exxon determined that, even though it would produce a substantially higher rate, it should not base its calculations on the start-up year, 1977. Simply because it is the start-up year, the throughput which can be achieved is not representative of the anticipated throughput when the pipeline is operating at current design capacity. Instead, Exxon first calculated a rate of $6.53 on

the basis of 1978 estimates at current design throughput, 1978 being the first full year of operation. In making this calculation, Exxon used estimates of 1978 operating costs supplied by Alyeska, depreciation based on a 25-year life, an allowance for future removal and restoration costs required to meet conditions imposed by the State and Federal governments, interest expense reflecting Exxon's average interest rate of 8% on outstanding debt invested in its share of TAPS, and State and Federal income taxes at the statutory rates. The basis for Exxon's selection of a 25-year depreciation period and its treatment of removal and restoration costs are set forth in Mr. Terry's Statement and in Attachments III and IV thereto. These matters are also discussed elsewhere in this Reply.

In calculating return on valuation, Exxon employed what it believes to be the standard practice before this Commission, i.e., in determining return, Exxon treated interest costs as an expense. The propriety of using this method of calculating return is discussed at length below in connection with the response to the attempt of the Bureau of Investigations and Enforcement to require use of a different method. Because Exxon is subject to the 1941 Consent Decree entered in *United States* v. *Atlantic Refining Co.*, C.A. No. 14060, D.D.C., limiting the dividends which can be paid by it to its parent company, the rate of return on valuation employed in constructing the rate was limited to 7%.

Exxon also elected to use the design capacity of TAPS (1.2 million barrels per day) as the measure of anticipated throughput in calculating revenues, although it is obvious that, even if the pipeline operates at 100% efficiency, the *revenue* throughput will be less. The Exxon tariffs provide for payment of transportation charges by shippers only for the volumes delivered to shippers. No transportation

charges are paid on the volumes of fuel required to operate pump stations along the line. The total fuel requirements for TAPS are estimated to be 1.5 million barrels per year. Similarly, no allowance was made for reductions in throughput due to operating conditions, although industry experience indicates that even pipelines operating under proration (i.e., where the volumes tendered exceed capacity) are not able to operate at 100% of capacity.

In addition to fuel requirements and operating conditions, throughput is also dependent on governmental actions and shippers' production rates. *The Washington Post* of June 20, 1977, states that the President's energy advisers are considering temporarily limiting production of Alaskan oil to West Coast needs, which are far below the capacity of the pipeline. Similarly, in a registration statement filed with the Securities and Exchange Commission on June 14, 1977, the British Petroleum Company Limited (BP) advised the public that, due to the lack of an in-place overland transportation system from the West Coast to other markets and a shortage of U.S.-flag tanker capacity, its affiliate, Sohio, would not be in a position in late 1977 and 1978 to take or otherwise dispose of its full entitlement of North Slope crude oil production, unless restrictions on the export of North Slope crude oil or the requirements of the Jones Act were modified. Sohio's share, at a production level of 1.2 million barrels per day, is approximately 637,860 barrels per day. The BP registration statement points out that the effect of Sohio being unable to take its proportionate share of the production could be to reduce the throughput of TAPS below the design capacity of 1.2 million barrels in both 1977 and 1978.

The rates required for TAPS are extremely sensitive to volume. Exxon's adoption of a rate base on system design capacity is almost certain to result in under-collections, with a consequent reduction in return.

As shown in Attachment V to Mr. Terry's statement, the rate resulting from using 1978 estimates and the methodology described above would be $6.53 per barrel. Based upon throughput reflecting system design, however, the adoption of that rate as an initial rate would have required Exxon to file a reduced rate, effective January 1, 1979, to reflect changes in expenses and to keep earnings within the 7% limit imposed by the Consent Decree. Believing that rate stability is of importance to shippers and to the pubic, Exxon explored other measures in an attempt to avoid the necessity for early and frequent rate changes. The Consent Decree permits pipelines operating under its terms to carry forward dividend deficiencies for a period of three years. This provision enables Exxon to establish an initial rate reflecting the average anticipated experience during the first four full years of operations. In determining such a rate, Exxon again utilized the present design capacity of the pipeline to estimate throughput for the first three years and its current forecast of an expansion of the system, effective July 1, 1981. The 1981 throughput volumes used in the calculation for Exxon were 240,000 barrels per day from January 1, through June 30, and 308,600 barrels per day from July 1 to December 31. Adjustments were made to operating expenses, depreciation, and interest charges to reflect both the passage of time and the forecasted expansion.

As shown in Attachment VI to Mr. Terry's statement, the result of using the average for the years 1978-1981, rather than using the year 1978 alone is to reduce the initial rate from $6.53 per barrel to the $6.27 rate proposed by Exxon (see Table 3).

Assuming that the throughput is equivalent to design capacity, the average return on valuation, calculated by treating interest as an expense, would be 7%. However, as

EXXON PIPELINE COMPANY TAPS TARIFF COMPUTATION

	$\overline{MS}$				
	1978	1979	1980	1981	1978-1981 Average
Revenue	572.0	567.4	563.2	571.5	568.7
Operating Expense					
Alyeska Field and Administrative	44.8	47.0	49.4	57.1	49.6
Topping Plant Fuel and Natural Gas	4.5	4.6	4.7	6.1	5.0
Exxon Pipeline Company Administrative	.7	.7	.8	.8	.8
Ad Valorem Taxes	31.9	31.9	31.9	32.8	32.1
Book Depreciation	73.7	73.7	73.7	75.8	74.2
TAPS Dismantling	16.4	16.4	16.4	16.4	16.4
Interest Expense	114.5	106.7	98.7	92.6	103.2
Taxable Income					287.4
Provision for Income Taxes					149.1
Earnings					138.3
Throughput—$\overline{MB}$	87.60	87.60	87.60	100.22	90.75
ICC valuation					1,976.3
Return on Valuation—%					7.0
Tariff Rate—$/bbl.					6.27

noted above, Exxon will not have revenue throughput equal to its share of design capacity even if the pipeline operates at 100% efficiency, and there is no rational basis to anticipate that the pipeline will operate at 100% efficiency.

In order to secure a more realistic picture of the short-term financial results to be expected from the adoption of the $6.27 rate, Exxon prepared a forecast for the years 1977 and 1978, estimating a loss of capacity of 10% for 1977 due to the uncertainties of start-up and operating conditions and 5% for 1978. These estimates of loss of capacity do not reflect potential restraints on throughput such as the imposition of government controls on production or the inability of any of the producers to take their full share of production. Based upon this analysis, as shown in Attachment VII to Mr. Terry's statement, under the $6.27 rate, the return on valuation would be only 5.4% for 1977 and 5.8% for 1978, rather than the 7% used in constructing the $6.27 rate.

On the basis of the methods of determining the reasonableness of pipeline rates which this Commission regularly employs, it is clear that Exxon's $6.27 initial rate is not unreasonably high. Indeed, there is sound basis for an argument that the rate is too low, given the substantial hazards facing Exxon's ability to achieve the throughput upon which the rate is based.

Exxon's initial rate has been established in accordance with the principles and practices followed by this Commission, with doubts being resolved in favor of the shipper, rather than the pipeline. In these circumstances, and given the consequences of suspension, a decision by this Commission to suspend would be an abuse of discretion.

III. SUSPENSION OF THE RATES AS FILED WITH LEAVE GIVEN TO REFILE ON A LOWER BASIS OF RATES IS TANTAMOUNT TO A PRESCRIPTION OF RATES WHICH CAN ONLY BE ACCOMPLISHED AFTER "FULL HEARING"

Protestants suggest that suspension of the rates as filed be accompanied by special permission to file on one-days' notice tariffs containing reduced initial rates which the Commission in this suspension proceeding determines should be allowed to take effect and that the *lower,* rather than the filed, rates be encompassed in the Commission's investigation. Such action, if adopted by the Commission, would be beyond the Commission's powers under Section 15(7) of the Act, 49 U.S.C. § 15(7), and would constitute a determination and prescription of rates for the future which can only be done by the Commission after it has held a "full hearing."

Under Section 15(7) the Commission may do certain things in response to the filing of a schedule of new rates: (1) the Commission may investigate the lawfulness of the rates as filed; (2) if the Commission decides to investigate the rates, it may suspend them for a period of up to seven months; (3) if the Commission decides to investigate, but not suspend, it may require the carriers, in the case of increased rates only, to keep accurate account of all amounts received by reason of the increase and to refund any portion (or all) of this increase which the Commission, after investigation, finds to have been unjustified; and (4) the Commission may allow the rates to go into effect without suspension or investigation. Section 15(7) does *not* authorize the Commission as an alternative to a decision as to whether to suspend or not to suspend to make a determination on the basis of protests, oral argument, or on any other basis, that the rates as filed are unreasonable

and should not be allowed to go into effect, but that a lower level of rates is more appropriate and that if tariffs of such lower rates are filed the Commission will not exercise its suspension power. To do so is legally and practically a determination and prescription of rates for the future and is an improper use of the Commission's suspension power. Indeed, Section 15(7) itself provides that it is only after "full hearing" that the Commission "may make such order with reference thereto [i.e., to rates under investigation] as would be proper in a proceeding initiated after it had become effective."

The last quoted language plainly has reference to Section 15(1) of the Act which provides for investigations of existing rates. Section 15(1) authorizes the Commission, if "after full hearing" it finds that an existing rate is unlawful, to "determine and prescribe" a just and reasonable rate.

Thus, under Section 15(1), the Commission may prescribe a rate when it finds the existing rate unlawful, and under Section 15(7) it may prescribe a rate in lieu of a filed rate which the carrier has not justified—but, in either case, the Commission can only do so after it has held a "full hearing."

Moss v. *C.A.B.*, 430 F.2d 891 (D.C. Cir. 1970) clearly shows that the action here proposed by protestants is invalid. In *Moss,* the major air lines filed tariffs of increased domestic fares. In response to those tariffs, the CAB, governed by a statutory framework very similar to that which governs this Commission in rate matters, held oral argument and very shortly thereafter issued an order in which it found that the proposed increased rates may be unjust and unreasonable and that they should be suspended. In that same order the CAB outlined a schedule of lower rates which it believed was reasonable and indicated that

tariffs of such lower rates would not be suspended. A petition for review was filed, principally on the ground that the CAB action was a prescription of rates which was invalid by reason of the agency's failure to observe hearing requirements. The Court of Appeals set aside the CAB order on that ground.[4]

The *Moss* court was not persuaded by the CAB's contentions on appeal, which are also advanced by protestants here (e.g., Bureau Protest, pp. 33-34), that such utilization of the agency's suspension power is proper because the agency is not ordering the carriers to do anything; it is merely suggesting a course of action for the carriers, that the carriers are not legally bound to do anything, and that, if the carriers do file tariffs of the suggested lower rates, it is a "voluntary" act on their part and the resulting rates are carrier-made rates.[5] *Moss* responded to such arguments as follows:

> "The Board did all that it could, short of formally styling its order at rate-making, to induce the carriers to adopt the proposed rates" (430 F.2d at 898).
>
> • • •
>
> "It would seem that upon any realistic interpretation this order involved the legislative determination

4. The Federal Aviation Act authorizes the CAB to determine and prescribe rates "after notice and hearing" (49 U.S.C. § 1482(d)). The Interstate Commerce Act authorizes the Commission to determine and prescribe "after *full* hearing" (49 U.S.C. § § 15(1), 15(7); emphasis added). *A fortiori,* if the agency action in *Moss* did not meet hearing requirements, the action proposed here by protestants would be invalid.

5. Here, the Bureau of Investigations and Enforcement suggests (p. 13) that the Commission include a self-serving statement in its order "that it is not prescribing rates within the meaning of *Arizona Grocery.*"

> of rates by an agency for the future, as described in the Arizona Grocery case" (430 F.2d at 897).[6]

The Bureau of Investigations and Enforcement claims that the proposed action is proper because the Commission in general increase proceedings has "often permitted the refiling on a lower basis pending the proceedings when proposed rates were prima facie unreasonable," citing (p. 13) Ex Parte No. 259, *Increased Freight Rates,* 1969, 332 I.C.C. 590 (1968). It also cites (p. 34) as support for what it characterizes as a "conditional no-suspend order" the Commission's action in Ex Parte No. 305, *Nationwide Increase of Ten Percent In Freight Rates and Charges,* 1974, sustained in *United States* v. *Chesapeake & Ohio R. Co.,* 426 U.S. 500 (1976).

The Commission's action in Ex Parte No. 305 provides no support for the action proposed here. There, the railroads applied for a ten percent general increase in their rates and charges. The railroads conceded that the proposed increase could be justified on the basis of increases in operating expenses only to the extent of three percent, but represented to the Commission that the balance (seven percent) of the increase was required in order to make up for the deferral of maintenance and other necessary capital expenditures. The Commission suspended the ten-

6. In *Moss,* the order did provide that the CAB "intend[ed] to consider fares produced by [its] formula as a 'just and reasonable' ceiling" (430 F.2d at 896). However, it would not seem that the elimination of that language would make the agency's action any less a prescription of maximum reasonable rates. As the *Moss* court noted:

> "As a *practical* matter, the Board's order amounted to the prescription of rates because, as the Board admits, the pressures on the carriers to file rates conforming exactly with the Board's formula was great, if not actually irresistible" (430 F.2d at 897; emphasis added).

percent increase, but granted the carriers leave to refile for a ten percent increase specifically conditioned on *use* of the revenues derived from that portion of the increase over and above the amount needed, up to three percent, for increased materials and supply costs (other than fuel) to reduce deferred maintenance of plant and equipment and delayed capital improvements. The Commission's order was upheld by the Supreme Court as "a legitimate, reasonable and direct adjustment to the Commission's explicit statutory power to suspend rates pending investigation." *United States* v. *Chesapeake & Ohio R. Co.,* 426 U.S. 500, 514 (1976).

The conditional suspension order in Ex Parte No. 305 is no support for the kind of order proposed here. The inquiry into the validity of the Ex Parte No. 305 order was essentially a test of whether the Commission could intrude upon management decisions with respect to the expenditure of carrier funds. The Supreme Court decided in the context of that proceeding that the Commission could, because it "specified no particular projects" and, more importantly, because the railroads had represented to the Commission that the increase could only be justified by their needs in respect of maintenance and capital deferrals—the "Commission simply held the railroads to their representation" (426 U.S. at 515). That decision has no relevance here, where it is proposed that the Commission suspend new rates which the carriers have determined to be just and reasonable, giving them the alternative of either having no rate in effect, in which case they cannot engage in transportation, or accepting a level of rates which the Commission, without any hearing whatsoever, has arbitrarily decided is appropriate.

Similarly, it is no answer to suggest, as the Bureau does, that the Commission has suspended the increased rates as

filed in general increase proceedings and permitted the refiling of rates on a lower basis. Suffice it to say that the "we suspend these rates, but won't suspend rates filed as we determine them" order condemned in *Moss* was made in the context of a general increase proceeding in which the agency deemed the increase proposal prima facie unreasonable. More importantly, however, there is a critical distinction which must be recognized between the filing of a general increase in existing rates and the filing of an initial rate to be made applicable to an entirely new movement. In a general increase proceeding, the carriers seek a permissive order authorizing them, based upon increases in operating costs, to apply an across-the-board increase in their rates. Suspension of such a tariff filing, or suspension with leave to refile for a lesser increase (assuming the validity of that action), while having very serious consequences for the carriers' net operating results, does leave the carriers in the posture of continuing to generate revenue on the basis of either the existing, or slightly increased, rates. In contrast, the suspension of a new rate, or suspension of a new rate with leave to refile on a lower basis, can have a devastating impact upon the involved carriers, particularly where large capital expenditures have been involved in the development and construction of the transportation service to which the rate is to apply. In that situation, the carriers are forced either to suffer the catastrophic consequence of having their newly-constructed facilities remain idle or to accept "voluntarily" rates which the Commission, in a back-room exercise of arbitrary power, has determined to be acceptable in order that their investment will generate some revenue.

In *Moss,* the court considered the pressures on the carriers to accept the lesser general increase "suggested" by

the CAB to be "irresistible." It does not require elaborate argument to conclude that the pressures on the TAPS carriers which would be created by an order along the lines proposed by protestants are enormous. Simply stated, the proposed exercise of the Commission's suspension power to coerce the adoption of a lower rate is a heavy club which no regulatory agency should be permitted to have, and which this Commission does not have.

IV. The Bureau's Proposed Rates Do Not Conform To Established Commission Precedent

The Bureau of Investigations and Enforcement is the only protestant that even purports to sponsor proposed rates which reflect any aspect of the Commission's conventional approach to measuring the reasonableness of pipeline rates. The Bureau's rates, like the rate proposed by Exxon, are based on valuation, as has historically been the case since the Commission assumed jurisdiction over pipelines. Any differences between the valuation employed by the Bureau and that employed by Exxon are minor.

The Bureau and Exxon also agree that, for the purposes of these suspension proceedings, the Commission should accept Exxon's figures for operating costs, daily throughput, and the original cost used in determining rate base, and that taxes should be normalized.

Apart from the foregoing discussion of the lack of any authority in the Commission to condition the suspension of a rate on the filing of a lower rate, the areas of disagreement between the Bureau and Exxon, which produce a rate of $6.27 under Exxon's approach and a rate of $5.00 under that of the Bureau, although extremely significant are relatively few. These issues can be summarized as follows:

1. The Bureau assumes a useful life for TAPS of 27.5 years, while Exxon employs a life of 25 years.

2. The Bureau assumes both that the amounts included in cost of service to cover removal and restoration costs will be tax free and will ultimately be deductible for Alaskan income tax when expended. The Bureau also contends that the liability to incur such costs is contingent, rather than fixed. In both respects, the Bureau is wrong.

3. Exxon and the Bureau disagree on the treatment of interest in calculating return on valuation. Exxon treats interest as an expense, while the Bureau does not, contending that interest should be included in return.

4. The Bureau, using its preferred method of calculating return, allows a rate of return of only 10%. It is Exxon's position that, if the Bureau's method were to be adopted, such a rate of return is clearly inadequate.

The State of Alaska has also submitted a rate calculation for Sohio only using the method adopted by the Bureau, although it does not advocate its adoption. In principle, Alaska's computation suffers from the same defects as the Bureau's in treating interest improperly, and, accordingly is not treated separately.

A. Depreciation

With respect to depreciation, the Bureau cites sources reflecting estimates of useful life for the existing Alaskan fields ranging from 25 to 35 years.[7] It then advocates adoption of the average of the FPC range, asserting that 27.5 years is somehow "more reasonable" than 25 years.

7. FPC—25 to 30 years; El Paso Alaska—28 years; FEA—26.5 years; Wainwright Securities, Inc.—35 years.

In taking this position, the Bureau makes no independent analysis. More importantly, it ignores the fact that the FPC estimate dealt with the physical life of the *field,* and did not encompass the question of the useful economic life of the pipeline. It may well be, and indeed is probable, that the field will still be physically capable of producing some oil economically (in terms of production costs) well after it has become uneconomic to transport that oil through the pipeline because of inadequate throughput.

As Exxon advised the Commission's Bureau of Accounts on April 27, 1977, it is Exxon's position that the TAPS facilities should be depreciated over that period during which an owner can expect to earn a fair return, based upon ICC valuation, giving proper consideration to the high level of risk inherent in the construction and operation of TAPS. Making a precise estimate of this period is extremely difficult in the case of TAPS since the U.S. pipeline industry has no experience in operating a pipeline of the design, or in an environment, like that of TAPS. Furthermore, the economic life of the pipeline is determined not only by the amount of throughput, but also by the relation of throughput to (1) the level of pipeline operating and maintenance expense in a totally new and radically difficult environment for a pipeline that is subject to vigorous government specifications and oversight, (2) the impact of inflation on those costs and expenses, and (3) the maximum tariff rates that this Commission will approve and that shippers will pay in light of their own operating expenses and the prices being paid or permitted for crude oil in the connected fields. Based on its best judgment, and all of its experience, it is Exxon's belief that a fair return can no longer earned when throughput declines to 200-300 thousand barrels per day. The so-called Mortada Study upon which the Bureau relies (when it suits

its convenience) estimates that by the 25th year, throughput will be reduced to 240,000 barrels per day, and would continue to decline. For this reason, Exxon estimates that the reasonable maximum estimate of TAPS useful life, at this time, is 25 years.

There is, of course, no guarantee that a useful life that long can be achieved. The actions of this Commission, price changes by the OPEC members, lack of transportation facilities in the lower-48 states, physical calamities, increasing inflation, and many other presently unknown factors may drastically shorten that period. If it does, Exxon and the other TAPS owners bear the risk. On the other hand, if experience should indicate that the 25-year life is too conservative, the depreciation rate can be adjusted. It makes no sense whatsoever either to fix a depreciation rate now on the basis of undiscovered oil, as certain protestants contend should be done, or to adopt the most optimistic estimates of the pipeline's useful life.

While the Bureau has labelled Exxon's use of a 25-year life as "conservative", it has not, and could not, assert that use of a 25-year life is unreasonable. Exxon has clearly shown a rational basis for its use of a 25-year life for TAPS. The Bureau's arbitrary selection of a 27.5 year life as "more reasonable", based on averaging an irrelevant estimate should be rejected.

B. Removal And Restoration Costs

Exxon has included an amount of $16.4 million per year in its expenses to reflect its unconditional obligation to bear its proportionate share of the cost of removing all above-ground TAPS facilities and restoring the land to a condition satisfactory to the Department of Interior at the end of the pipeline's useful life.

The Bureau questions this expense, contending that the liability is qualified rather than fixed. The Bureau bases this contention on the terms of Paragraph 13A of the Agreement and Grant of Right of Way, dated January 23, 1974, between the Department of Interior and the carriers. Paragraph 13A, however, applies to damages *during use.* The obligations to remove and restore *on completion of use* are found, not in paragraph 13A, but in Stiulpation 1.10.1 of Exhibit D to that Agreement. Stipulation 1.10.1 unconditionally obligates the carriers to remove and restore all above ground facilities on completion of use:

> "1.10 Completion of Use
>
> 1.10.1 Upon completion of the use of all, of a very substantial part, of the Right-of-Way or other portion of the Pipeline System, Permittees shall promptly remove all improvements and equipment, except as otherwise approved in writing by the Authorized Officer, and shall restore the land to a condition that is satisfactory to the Authorized Officer or at the option of Permittees pay the cost of such removal and restoration. The satisfaction of the Authorized Officer shall be stated in writing. Where approved in writing by the Authorized Officer, buried pipe may be left in place, provided all oil and residue are removed from the pipe and the ends are suitably capped."

The Bureau next challenges the amount included in its rate by Exxon to provide the funds necessary for this work, reducing this expense from $16.4 million to $7.6 million (Bureau Protest, App. A, pp. 1,2). This difference arises from the following differences of approach:

Exxon, in computing these costs maintains that a sum of money should be collected annually after-tax, which when

reinvested will earn the amount which, added to the principal, will be the amount required to perform the required work in 2002, when restoration and removal commence. In determining its requirements, Exxon has assumed that both the rate of escalation of costs over the 25 year period and the rate which it can earn on the after-tax amounts invested will be 6% also after taxes. Thus, of the $16.4 million which Exxon proposes to collect each year, it will have $8.5 million available to invest after taxes, which will accumulate to $466 million by the year 2002. Of this amount only $212.5 million will have been collected from shippers. The accumulated fund of $466 million represents slightly less than the present estimate of Exxon Pipeline's share of the restoration and removal costs, after giving effect to the tax consequences of these expenditures.

The Bureau, on the other hand, simplistically takes the estimated costs of restoration and removal in 1977 dollars and divides by 27.5 years, making no allowance for the taxability of these payments when received. Under the Bureau's approach, Exxon would have available for investment purposes only $3.58 million per year. Investing that sum at 6% for 27.5 years would produce a total of only about $236.6 million in 2005, or $229.4 million less than Exxon will require. Indeed, based on Exxon's share of these costs in 1977 dollars, the Bureau allows for only a cumulative inflation rate of less than 12% over a 27.5 year period, reflecting an average annual inflation rate only of 0.44%. This defies all experience.

The only way the Bureau could justify its approach would be to amend the tax laws of the United States and Alaska, not only to make the receipt of these funds tax-free, but also to provide, in the case of Alaska, for a tax deduction at a time when there is no Alaskan income against

which to offset the expense. In addition, the Bureau would have to convince the Commission that there will be virtually no inflation over the next 27.5 years.

Exxon's treatment of the removal and restoration costs is realistic, yet conservative. Exxon has, for example, assumed that the Department of Interior will not require the removal of *any* underground facilities. If Interior were to require the removal of all such facilities, the total costs of removal and restoration would triple. The future attitude of that Department with respect to the removal of such facilities is also a risk borne by Exxon and by the other owners of TAPS.

C. The Treatment of Interest In Calculating Return

In calculating its return on valuation, Exxon has followed the traditional practice of treating interest as an expense. On this basis, Exxon's return on valuation under its $6.27 rate for the year 1978 would be 6.5% with total TAPS throughput at 1.2 million barrels per day. By contrast, the returns produced by the rates proposed by the Bureau, the Department of Justice, and Alaska would be 3.8%, 1.9%, and 1.31%, respectively. If as noted above, the throughput volume falls by only 5%, Exxon's return becomes 5.8% at the $6.27 rate, and 3.3%, 1.7%, and 1.1% at the rates proposed by the Bureau, the Department of Justice, and Alaska.

The Bureau attempts to avoid the implications of the miniscule returns resulting from the lower rates proposed by protestants by arguing that, contrary to existing practice, interest should not be treated as an expense, but should, instead, be recovered in the return element of the rate.

The Bureau attempts to defend this approach primarily by relying on a comparison of certain 1935 figures set forth in *Reduced Pipe Line Rates and Gathering Charges,* 243 I.C.C. 115 (1940) with the figures shown in Transport Statistics, 1935, p. S-61, contending that these sources demonstrate that "the long-standing practice of the Commission in fact has been to include interest as an element of the return on valuation for pipelines" (Bureau Protest, p. 29).

While Exxon, which had no interest expense in 1935, cannot evaluate the Bureau's claims as to the practice in 1935 from its own records, it should be noted that its statement covers only 9 of the 35 pipelines listed in Appendix D of the Report in *Reduced Pipe Line Rates and Gathering Charges* (243 I.C.C. at 148), and that there were other pipelines in operation at that time which were not listed in Appendix D.

It should also be noted that in a very recent administrative construction of the *Reduced Pipe Line Rates* case, in ICC Docket No. 36352, *Petroleum Crude Oil, Griffith, Ind. to New York Points,* (October 14, 1976) involving the rates charged by Lakehead Pipe Line Company, the Administrative Law Judge took a position directly contrary to that of the Bureau stating:

> "As a result of these large volumes, at the through rates, the return on valuation (after interest expense is deducted) for both Lakehead and IPL is approximately 6 to 7 percent. • • • (Initial Decision, pp. 6-7).
>
> ". . . the standard used by Lakehead, i.e., allowing a 6 to 7 percent return on I.C.C. valuation [after deducting interest as an expense] in establishing the rate at issue is below that utilized heretofore by the Commission for crude oil pipelines in *Reduced Pipe*

> *Line Rates and Gathering Charles* 243 I.C.C. 115, 143 (1940) . . ." (*Id.* at p. 9).

This is at least a clear recognition that the practice of determining rate of return by treating interest as an expense, as Exxon has done, is common practice before this Commission.

The dangers of relying on the Bureau as a source of information as to what constitutes the Commission's usual practice with respect to pipeline ratemaking is clearly illustrated by its treatment of the decision in *Petroleum Products, William Brothers Pipe Line Company,* ICC Docket No. 35533, cited at page 27 of its Protest. The Bureau brushes off the *William Bros.* decision as the *only* "reported pipeline rate case that awards the entire return on valuation to the equity holders of the pipeline" (Bureau Protest, p. 27). In fact, the *William Bros.* decision is the *only* reported pipeline case which explicity treats interest as the Bureau contends it should be treated. Exxon does agree with the Bureau, however, that the *William Bros.* case is an anomaly. Moreover, in that proceeding, it made no practical difference to the pipeline which method was employed, since its rates were clearly reasonable under either method.

Contrary to the Bureau's position, if the practice in 1935 was as the Bureau contends, that practice was not "long-standing". The Commission itself has represented to the Congress as recently as March 22, 1976, that the standard methodology utilized in computing return on valuation for oil pipelines is to treat interest as an expense. In 1975 and 1976, responding to a questionnaire from the Subcommittee on Activities of Regulatory Agencies of the Committee on Small Business of the House of Representatives, the then Chairman of the Commission, George M. Stafford, supplied

the Subcommittee with a calculation of the rates of return on valuation for 90 regular pipelines for the years 1970 through 1972 (see Appendix B). A comparison of the Exxon data submitted by the Commission in this report with company records, together with checks on data for certain other pipelines, clearly shows that in calculating those rates of return, the Commission treated interest as an expense, as Exxon contends it should be treated. This data was submitted as a result of the questioning of Chairman Stafford, accompanied by Commissioner Murphy, Legislative Counsel Knappen, Deputy General Counsel Cerra, Counsel to the Chairman Ketchan, at hearings held on October 2, 1975, set forth in "Regulations of Various Federal Regulatory Agencies and Their Effect on Small Business" (Part 2) (the "Hungate Report"), commencing at page 890, in response to questions concerning pipeline returns.

This is hardly surprising, since other evidence shows that the Commission, as well as other concerned governmental bodies, have clearly understood that the Commission's standard practice has been to treat interest as an expense in determining rate of return on valuation.

In 1941, when the Department of Justice entered into the consent decree in *United States* v. *Atlantic Refining Co.*, C.A. No. 14060, D.D.C., it imposed a limitation on the dividend payments which could be made by subsidiary pipelines to their parents. The limitation prescribed by the decree prohibits the payment of dividends in excess of 7% of ICC valuation. The return is thus computed pursuant to the following formula:

$$\frac{\text{Net Income (After Tax)}}{\text{ICC Valuation}}$$

Clearly, net income after tax does not include interest as a component of return.

As former Attorney General Edward H. Levi advised the Department of Transportation on November 5, 1976, in connection with the LOOP and SEADOCK projects, "The consent decree was intended to hold down rates through its limitation on the rate of return".[8] If, as the Bureau contends, the Commission had been calculating return on the basis the Bureau now advocates, the consent decree would have offered no assurance that it would accomplish this purpose. Given any fixed set of operating results, valuation, and debt/equity ratio the funds available for payment of dividends will always be *less* under the Bureau's method of determining return than the dividend limitation imposed by the consent decree, except where the debt component of the capital structure is equal to or less than $\frac{.01}{i} \times V$, where i is the debt interest rate and V the valuation. Accordingly, any increase in debt with no change in interest rate, or any increase in interest rates with no change in debt, beyond that level would eliminate any impact of the Consent Decree, making the Bureau's proposed method of calculating return the constraint on rates.

Attorney General Levi's presentation in the LOOP and SEADOCK antitrust review demonstrates even though both debt/equity ratios and interest rates have risen markedly since 1941, that Consent Decree has in fact, continued to be the constraint on rates. Criticizing "the way in which both the ICC and the Consent Decree compute allowable returns," he stated ". . . in computing the net income figure, the ICC does not include interest payments (net of tax benefits) that constitute the return to the debt-

8. Report of the Attorney General Pursuant to Section 7 of the Deepwater Port Act of 1974 on the Applications of LOOP, Inc. and SEADOCK, Inc. For Deepwater Port Licenses, Nov. 5, 1976 ("A.G. Report"), p. 62.

supported assets of the rate base" (A.G. Report, p. 62). In concluding his discussion of tariff rates and charges, he stated, "In sum, for ICC-regulated pipelines, the ICC allows greater returns than those permitted under the Consent Decree . . ." (Cite p. 64).

Plainly, in 1941, the Department of Justice understood that the ICC did not treat interest as the Bureau contends it did in 1935, and it has continued for over 35 years to understand that the Commission's practice is the same as that prescribed in the Consent Decree.

The Federal Power Commission's Recommendation to the President on Alaska Natural Gas Transportation Systems, issued May 1, 1977, selectively quoted by the Bureau, is further evidence of the general knowledge that, in calculating return, this Commission has treated interest as an expense. As the Bureau has acknowledged, the FPC referred to "the usual ICC treatment of allowing a 7-8 percent rate of return *after taxes and interest* on ICC valuation (i.e., total assets)," precisely as Exxon contends it has done (Recommendation, p. XII-45; emphasis in original).

Furthermore, far from refusing to accept as reasonable the rate of return of 28-32% on equity, based on a debt/equity radio of 75-25, which the FPC estimated would result for TAPS from the ICC methodology, the FPC adopted a 23% overall rate of return as reasonable for an Alaskan gas pipeline. Given a 75/25 debt/equity ratio, this overall rate of return results in a 31% after-tax return on equity (*Id.* at pp. XII-46-XII-48). The FPC stated:

> "Such after-tax returns on equity are in line with the returns petroleum companies currently earn on their integrated operations, and will likely earn on the Alaskan oil pipeline *if comparable D/E ratios are assumed*" (Recommendation, pp. XII-47-XII-48; emphasi in original).

As the FPC stated with respect to the Alaskan gas pipeline, which it deemed to be comparable in size and complexity with TAPS (*id.* at XII-45):

> ". . . we cannot reasonably expect that such [petroleum] companies will risk billions of dollars on this project unless they have the *opportunity* to earn returns similar to those that they average on alternate projects" (*id.* at XII-46; emphasis in original).

The Bureau has wholly failed, as it must, to present any convincing evidence that at any time in the last 35 years, at least, the usual practice in calculating pipeline rates of return on valuation has not been to treat interest as an expense. The Bureau is perfectly free to argue that the method it advocates should be adopted, but not in these suspension proceedings. Such arguments properly belong in Ex Parte No. 308, where the Commission is already considering the issue of the general standards governing rate of return for oil pipelines.

D. Rate of Return Under the Bureau's Method

Assuming for purposes of discussion that the Bureau's method of calculating return is to be followed, the Bureau has already recognized in its Protest that the Commission's general guidelines for rate of return on valuation for oil pipelines, adopted in 1941, are not binding in an individual pipeline rate proceeding (see Bureau Protest, pp. 17-18). Recognizing that an automatic application of the 8% rate of return historically viewed as a general standard for crude oil pipelines would be grossly unjust as applied to TAPS, the Bureau recommends a return of 10 percent, historically applied to products lines, and not to crude lines. Exxon while it agrees with the Bureau that the rate of re-

turn on valuation must be tailored to the circumstances of a particular pipeline project in a specific rate proceeding, does not agree that 10% is adequate, assuming that the Bureau's method of calculating return is accepted. The mere fact that it was deemed a reasonable rate for products lines in the lower-48 states in 1941, certainly does not make it a reasonable rate for TAPS in 1977.

In Ex Parte No. 308, the Association of Oil Pipelines, acting on behalf of Exxon and many of its other members, filed testimony by Raymond B. Gary, a Managing Director of Morgan Stanley & Co., and Dr. Ezra Solomon, Dean Witter Professor of Finance at the Graduate School of Business of Stanford University, copies of which are submitted herewith as Appendixes C and D. These two witnesses, each a recognized expert in the field of finance, have employed different techniques to determine the minimum overall rate of return on valuation required for a relatively low risk oil pipeline, recognizing that these returns would not be sufficient for pipelines with above average riskiness. Mr. Gary concluded, on the basis of his market analysis, that 13-14% was minimum return on total valuation for an oil pipeline today. Dr. Solomon, comparing the relative risk of oil pipeline with that of Aaa corporate bonds, concluded that a return on total valuation of 13 to 13½ percent was appropriate for pipelines of minimum risk.

Since both Mr. Gary and Dr. Solomon dealt with total valuation, without considering the division of the capital employed into debt and equity components, their conclusions with respect to an overall rate of return can be directly compared with the Bureau's proposed 10% return.

On the basis of the analyses made by Mr. Gary and Dr. Solomon, it is clear that, if a 13-14% rate of return on total valuation is the minimum for a low-risk pipeline, a 10% return for one of the riskiest pipeline ventures ever under-

taken is grossly inadequate. The degree of inadequacy is indicated by the FPC's approval of a 23% overall rate of return for an Alaskan gas transportation system serving the same fields as those served by TAPS.

In setting its $6.27 rate, however, Exxon did not attempt to arrive at an overall rate of return based either on the market requirements considered by Mr. Gary or on the comparative risks considered by Dr. Solomon or on the risks peculiar to the TAPS project. Instead, Exxon established a rate in the same manner it has employed for conventional pipeline projects in the lower-48 states. Utilizing the Bureau's method of calculating return on valuation, *excluding interest as an expense,* the $6.27 rate results in an overall return of only 12.25%, *less* than the minimum return required for a minimum risk pipeline.

It is apparent that even if this Commission should depart from its settled practices and abrogate its decisions that matters of methodology which affect all pipelines are to be resolved in rulemaking proceedings and not in individual pipeline rate cases, Exxon's proposed $6.27 rate is just and reasonable, even when tested by the Bureau's method.

V. The Proposals of the State of Alaska and of the Department of Justice that the Commission Establish New Standards for Evaluating the Reasonableness of Pipeline Rates Should Not Be Considered in This Proceeding

A. The Commission Is Required By Statute To Determine The Valuation Of Oil Pipeline Property And Use That Valuation As The Rate Base

In its protest, the State of Alaska states that it "opposes the use of the Commission's 'valuation' as a rate base," asserting that the valuation rate base is inflationary

and precludes meaningful comparable earnings analysis. (Alaska Protest, p. 40). The Department of Justice without explicitly attacking the Commission's traditional valuation approach (or indeed, acknowledging its existence), also appears to advocate radically new standards for pipeline ratemaking. To the extent that these protestants suggest that the Commission employ some method for analyzing the joint owners' tariff schedules other than the required valuation approach, their protests should be ignored.

Section 19a of the Interstate Commerce Act, 49 U.S.C. § 19a, imposes upon the Commission the duty of determining the valuation of oil pipeline property. That section directs the Commission to ascertain for property used for common carrier purposes "the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation," and other elements of value of such properties (49 U.S.C. § 19a(b)). Based upon these data, the Commission is directed to determine "the value of the property of every common carrier as a whole . . ." (49 U.S.C. §19a(c)). Section 19a provides that the final valuation determined by the Commission "shall be published and shall be prima facie evidence of the value of the property in all proceedings under [Chapter 1 of the Act] . . ." (49 U.S.C. § 19a(i)).

Plainly, the Commission's present method of determining the reasonableness of pipeline rates has been established by Congress, and Congress' intention that the present methods be continued was recently confirmed when, in adopting radical changes in the methods of establishing railroad rates, Congress elected to make no change in either Sections 15(7) or 19a as applied to pipelines. Reporting on the legislation which evolved into the Railroad Revitalization and Regulatory Reform Act of 1976, creating the

new standards of ratemaking for railroads, the House Committee on Interstate and Foreign Commerce stated:

> "The Committee has not included oil pipelines in it [i.e., the new standards of ratemaking], since there does not, at the present time, appear to be a need to do so. Under Part I of the Interstate Commerce Act the tariff rates of interstate common carrier oil pipelines are subject to ICC regulation to the same extent as those of railroads. Historically, in determining the reasonableness of the rates of an oil pipeline, the ICC has based such determination upon the annual valuation of the pipeline established by the Commission. Included in the formula used by the Commission in establishing annual valuations of pipeline companies is a factor reflecting the reproduction cost-new of the pipeline system, less depreciation. The use by the ICC of the annual valuation of the pipeline in determining the reasonableness of its rates has permitted the industry to generate common carrier revenues and earnings adequate to engender substantial capital investment in, and needed expansion of, the nation's oil pipeline network." H.R. Report No. 93-1381, 93d Cong., 2d Sess. p. 26, n. 1 (1974).

These protestants' attempts to have the Commission view the joint owners' filed rates from any viewpoint other than a valuation rate base, as required by statute, should be rejected.

B. The Protestants' Questions Concerning The Commission's Valuation Methodology Cannot Be Raised In A Suspension Or Rate Proceeding

Both the State of Alaska and the Department of Justice reject the Commission's established practice of reviewing

the reasonableness of rates by measuring them against return on valuation and both protestants engage in a debt/equity analysis of individual owners, extrapolating from partial cost and revenue figures and removing from the normal valuation base figures which they find objectionable. (*See* Alaska Protest, pp. 40-44; DOJ Protest, pp. 2-8, Exhibits I and II) In doing so, the protestants seek to inject improperly in this suspension proceeding issues involving valuation procedures and methodology, issues which can be dealt with only in a rule-making proceeding.

The framers of the Interstate Commerce Act clearly intended to keep rate proceedings separate and distinct from valuation proceedings. They also contemplated that the methodology used in valuation proceedings would be determined by rules and regulations, properly proposed and examined in rule-making proceedings pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§551 *et seq.*, before becoming effective. They certainly did not intend that the Commission use a different valuation methodology for each different pipeline carrier, nor did they intend that the Commission's valuation methodology be established or modified in the context of a carrier-initiated rate filing.

The Commission has in fact initiated a rule-making proceeding that encompasses the methodology used for pipeline valuation. In that proceeding, Ex Parte No. 308, *Valuation of Common Carrier Pipe Lines,* described more fully below, the Commission is dealing with the kinds of issues raised by some of the protestants. These protestants' concerns with regard to valuation should be focused on that rule-making proceeding and not on this suspension proceeding.

Ex Parte No. 308 was instituted on September 3, 1974, when the Commission served a "Notice of Proposed Rulemaking and Order" in which it stated that,

> ". . . a proceeding be, and it is hereby, instituted under part I of the Interstate Commerce Act (49 U.S.C. Sec. 1), including section 19a thereof, relating to valuation of common-carrier property, and pursuant to sections 553 and 554 of the Administrative Procedure Act (5 U.S.C. secs. 553 and 554), for the purpose of determining whether any modification is required in the rules and regulations contained in part 1204 of Title 49 of the Code of Federal Regulations, entitled 'Pipeline Companies, List of Institution and Accounts,' in part 1260 of said Title 49, entitled 'Reporting of Data for Initial Pipeline Valuations,' and in part 1261 of said Title 49, entitled "Regulations Governing the Reporting of Property Changes; Pipeline Carriers" or any modification in the methodology of valuation stated in *Ajax Pipe Line Corporation,* 50 Val. Rep. 1."

The Notice of Proposed Rulemaking was issued not long after the Initial Decision in Docket No. 35533, *Petroleum Products, Williams Brothers Pipe Line Company,* a decision in which the presiding judge discussed valuation and pipeline ratemaking extensively and rejected shippers' objections to the Commission's valuation process (see below). Ex Parte No. 308 was initially consolidated with Valuation Docket No. 1423, *Williams Brothers Pipe Line Company,* in which protests had raised issues concerning the Commission's valuation process, including the methodology employed. Shortly thereafter, however, the Commission apparently recognized the impropriety of consolidating a

rulemaking proceeding and a valuation proceeding and, on December 16, 1974, issued a "Supplemental Notice of Proposed Rulemaking and Order" in which it: (1) severed Valuation Docket No. 1423 from Ex Parte No. 308; (2) stated that consideration of pipeline valuation methodologies is the proper subject of, and will be considered in, Ex Parte No. 308; and (3) ordered that Valuation Docket No. 1423 be governed by the Commission's existing rules and regulations regarding valuation. From that point, Ex Parte No. 308 proceeded as would any rulemaking proceeding. On December 18, 1975, the Commission issued another "Supplemental Notice of Proposed Rulemaking and Order," broadening the proceeding to include an examination, on an industry-wide basis, of the proper rate of return for crude petroleum and petroleum products pipelines.[9] Statements of views and data have been filed by the various parties in Ex Parte No. 308 and a hearing is scheduled for August 16, 1977, for the purpose of cross-examining witnesses.

It is very clear that the issues concerning valuation methodology raised by the State of Alaska and the Department of Justice are encompassed by Ex Parte No. 308 and that, accordingly, those issues should not be encompassed by this or any other rate proceeding. The Commission recently recognized the impropriety and wastefulness of trying to interject issues involving valuation methodology in a pipeline rate proceeding. In *Petroleum Products, Williams Brothers Pipe Line Company,* Docket No. 35533, *supra,* a proceeding involving carrier-initiated increased pipeline rates and initial joint rates, various complaining parties attacked the reasonableness of the rates and attacked the use of the Commission's valuation as a rate

9. Obviously, the generalized determinations to be reached in Ex Parte No. 308 on rate of return will not be controlling in particular rate cases.

base, asserting that the valuation procedures were objectionable in a number of respects. The complainants opposed the inclusion of certain property in the valuation rate base, the weight given certain costs in the valuation formula, and the rate of return adopted by the Commission as a reasonable guideline for petroleum pipelines.

The presiding judge found the proposed increased rates just and reasonable and the proposed initial joint rates not unlawful (Initial Decision, June 19, 1974). In doing so, he wrote (p. 18):

> ". . . The matter of defects in the Commission's valuation process raised by the Shipper Group has no place here. The valuation process pursuant to section 19a has been employed by the Commission for many years and on railroad and pipeline valuations has withstood many challenges. Any questions involving the valuation process should be determined in a rulemaking proceeding at which all affected persons are allowed to present their views."

Upon exceptions of various shippers, the ultimate conclusions of the Administrative Law Judge were adopted by Division 2 (351 I.C.C. 102, November 5, 1975). In commenting upon the shippers' exceptions regarding valuation methodology, Division 2 noted that (351 I.C.C. at 112):

> "In Ex Parte No. 308, the Commission will address itself to each of the seven elements it considers in the development of a valuation. These are (1) original cost, (2) cost of reproduction new, (3) cost of reproduction new less depreciation, (4) going concern value, (5) present value of land, (6) present value of rights-of-way, and (7) working capital. Since the Commission applies the same procedures

> equally to all pipeline carriers under its jurisdiction, there is no reason to single out one carrier and apply different procedures. If the Commission should elect to change its methodology of performing valuations in Ex Parte No. 308, the new methodology will be applied to all carriers equally and on the same basis."

On reconsideration, the Commission essentially affirmed the ultimate conclusions reached by Division 2 and the presiding judge and stated the following, pertinent to the protests in this proceeding (Report Of The Commission On Reconsideration, December 3, 1976, pp. 6, 7, 8):[10]

> ". . . Questions have been raised in this proceeding both as to whether the carrier's valuation is the proper rate base, and as to what rate of return should be permitted.
>
> • • •
>
> "We conclude that the Commission's valuation of WBPL's properties is the proper rate base to be employed in this proceeding . . . Considerations of consistency and fairness require that we adhere to our previously recognized criteria in investigating the rates of particular pipelines at the present time . . . .
>
> • • •
>
> "The technique employed by the Commission in making its valuations was discussed in the Division's report. As the Division found, this is not the proceeding for considering a change in the valuation

10. The Commission's decision is Docket No. 35533 is currently on appeal in the Circuit Court of Appeals for the District of Columbia *sub nom. Farmers' Union Central Exch., et al.* v. *ICC*, No. 76-2138.

> methods. Such questions will be dealt with in the pending rulemaking proceeding in Ex Parte No. 308, *Valuation of Common Carrier Pipelines.*"[11]

While the Commission was considering Division 2's conclusions in Docket No. 35533, a similar conclusion with regard to raising issues of valuation methodology in rate proceedings was reached by the Presiding Judge in another Williams Brothers Pipe Line Company rate increase proceeding, I & S Docket No. 9089 (July 27, 1976, p. 18):

> "A valuation rate base, determined upon the basic concepts of the Commission, is the proper base for use in determining rate of return for net carrier earnings of pipelines. To establish a rate of return on any basis other than that previously accepted by the Commission . . . presupposes the Commission's decision in Ex Parte No. 308, *Valuation of Common Carrier Pipelines.* Therefore it follows that in the instant general increase, reasonableness of rates must be based upon rate of return computed by applying total net carrier revenues, less an amount for Federal Income Taxes, against a valuation rate base . . . ."

These excerpts from the Commission's and the presiding judges' decisions in Docket No. 35533 and I & S Docket No. 9089 clearly show that the questions raised by the protest-

11. The Commission also noted that Division 2 had recommended that the scope of the proceeding in Ex Parte No. 308 be broadened to include consideration of the rate of return question. As noted previously, Ex Parte No. 308 was so expanded by Commission order of December 18, 1975, to "include an examination of what is the proper rate of return for crude petroleum and petroleum products." That examination is taking place, of course, on an industry-wide basis, leaving individual rates of return for individual pipe line carriers to be determined in individual rate proceedings.

ants concerning the use of valuation methodology should be removed from consideration in this suspension proceeding since they are the focal issues in Ex Parte No. 308. To attempt to deal with those issues here would be: (1) violative of the statutory scheme separating specific rate-making, general rulemaking, and valuation; (2) unfair to the joint owners of TAPS who have assumed that the existing valuation methodology will apply until modified in a proper rulemaking proceeding such as Ex Parte No. 308; and (3) wasteful of the Commission's and the parties' time since those issues are already undergoing extensive study in Ex Parte No. 308.

In sum, the process submitted herein, insofar as they raise questions of valuation methodology, are improper and should be summarily rejected.

Similarly the protestants' assertions that the original cost of TAPS may be overstated, based on allegations of waste and mismanagement, cannot be dealt with in this suspension proceeding, as the protestants expressly or impliedly concede. Indeed, given the fact that none of the protestants actually attempt to use these allegations in their alternate rate proposals, it seems fair to assume that the attention they give to these matters at this stage is intended simply to divert the Commission from the task at hand and to establish a prejudicial climate in which the Commission is to make its decision with respect to the exercise of its suspension power. To the extent such charges are reasserted in the statutory valuation proceeding which this Commission must undertake, all questions relating to reasonableness of the costs actually incurred in constructing TAPS can be resolved and appropriate action taken

thereafter. Suffice it to say at this point that Exxon is confident that when all of the facts are before the Commission it will be found that those costs were reasonable, given the magnitude of this project, the adverse conditions under which it was constructed, and the constraints imposed by both the State and Federal governments to protect the environment.

At this stage of these proceedings, it is clear that these allegations must be put to one side until resolved after a full hearing. In *West Ohio Gas Co.* v. *Public Utilities Com.*, 294 U.S. 63 (1935), the Supreme Court, dealing with a constitutional challenge that the rates of a gas distribution company were confiscatory in that they provided an inadequate return on valuation because of the exclusion of certain expenses as wasteful or negligently incurred, stated:

> "A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence . . ." (294 U.S. at 68).

And, in the absence of evidence, presented under circumstances which accord the utility due process, the Court ruled that:

> "Good faith is to be presumed on the part of the managed of a business. • • • In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay." (294 U.S. at 72).

The TAPS owners are clearly entitled to this presumption in these suspension proceedings.

VI. The Initial Rate Proposed by Exxon is Just and Reasonable Under an Appropriate Capitalization Standard

Even if this Commission could properly consider the capitalization approach advocated by Alaska and the Department of Justice, their implementation of their proposed methodology is patently wrong.

In order to depress the allowable rates for transportation via TAPS, Alaska's consultant Dr. Michael J. Ileo has repudiated his own representations, made under oath to the Alaska Pipeline Commission as a consultant to its Staff, earlier this year. In hearings before that Commission, in *Nikiski Alaska Pipeline Company,* Docket Nos. P-76-3 and P-77-3, Dr. Ileo stated that, in the case of a pipeline which is a wholly-owned subsidiary, the appropriate capital structure to be considered is not that of the pipeline, but that of the parent, stating:

> ". . . a critical issue which must be decided by the Commission is how to treat the ownership and consequently, the equity position, of Nikiski. There are three possible options open to the Commission:
>
> (1) treat Nikiski as if it stands alone as an independent company;
>
> (2) treat Nikiski as an operating subsidiary of Tesoro Petroleum Corporation, its parent; or
>
> (3) treat Nikiski as being owned by certain institutional investors.
>
> ". . . [I]t would be incorrect in my judgment to treat Nikiski as if it were an independent company as long as it is wholly owned by Tesoro. This is the case because all of the capital of Nikiski is raised by Tesoro. Moreover, despite the fact that Nikiski appears to be nearly 100% debt financed by Tesoro, it is truly financed by the consolidated capital structure of Tesoro just as any wholly owned operating subsidiary of Tesoro. The fact that Nikiski would never have been constructed without the financial backing of Tesoro, as reflected in the testimony of Nikiski, clearly reflects this situation" (Direct Testimony of Michael I. Ileo, March 14, 1977, pp. 61-62).

Moreover, in that same proceeding, Mr. David Parcell, who like Dr. Ileo is employed by Technical Associates, Incorporated, stated that, because of its status as a wholly-owned subsidiary of Tesoro, the separate capital structure of Nikiski was "arbitrary and meaningless," explaining that:

> ". . . Nikiski is apparently financed as part of the overall Tesoro system with all of its capital essentially coming through the parent (whether directly or indirectly). It is thus fair to say that Tesoro could classify all of its investment in Nikiski as either capital stock, advances or a combination of the two, regardless of the capital structure utilized to obtain the funds to capitalize Nikiski. Consequently, to set rates on this basis would be improper since it could easily lead to excessive earnings at the parent level" (Direct Testimony of David C. Parcell, March 14, 1977, p. 4).

Mr. Parcell also noted that since "virtually all of the petroleum pipeline companies are owned, either singularly or as joint ventures, by oil companies," the same conclusions are equally applicable to other subsidiary pipelines (*id.* at p. 2.).

Protest Reply of Exxon Pipeline.

Somehow between March 14, 1977 and June 15, 1977, Dr. Ileo seems to have forgotten his testimony before the Alaska Pipeline Commission. Here, despite the fact that Exxon, like Nikiski, is a wholly-owned subsidiary and that TAPS would never have been built without the financial backing of parent companies, Dr. Ileo completely ignores the capital structure of the parents and utilizes only the capital structure of the respective joint interest shares of TAPS. Dr. Ileo's methodology in this proceeding is, accordingly, clearly contrary to his own judgment.

Dr. Ileo's conclusions concerning the impropriety of utilizing the capital structure of a subsidiary pipeline in determining return as set forth in his testimony before the Alaskan Pipeline Commission are confirmed by the verified testimony of Raymond G. Gary, submitted by the Association of Oil Pipelines in Ex Parte 308 on behalf of Exxon and other members referred to above. Mr. Gary stated at pages 10 through 12 of his testimony that (See Appendix C to this Reply):

> "Most oil pipelines are highly leveraged with debt, in the case of new systems, representing initially as much as 90% of total capitalization. Such debt ratios decrease, however, over the life of the particular pipeline. The high degree of leverage exhibited by pipeline companies is a direct outgrowth of the Elkins Act Pipeline Consent Decree entered into in 1941, which limited dividends on pipelines (owned by companies subject to the Consent Decree) to 7% of the ICC valuation of common carrier property owned and used in the business. The 7% figure established in 1941 is, however, unrealistic in terms of financial conditions prevailing today and had led to the financial patterns which have since evolved.

Protest Reply of Exxon Pipeline.

> In order to maximize returns on total capital within the absolute limit on permissible payouts, pipeline companies were forced to adopt the policy of financing new investments by debt to the greatest extent possible. In essence, the initial debt ratios of pipeline companies are artificially high, and on a stand-alone basis (i.e., without shipper-owner guarantee of debt) would be much lower.
>
> "Shipper-owner support of pipelines has enabled pipeline companies to place large amounts of debt, both as to dollar amount and ratio of debt to equity, with private and public investors at interest costs which reflect the financial strength of the shipper-owners. In contrast, a representative sample of industrial companies indicates a debt ratio (long-term debt as a percent of capitalization) of about 20% for Aaa/AAA (highest grade) companies and a debt ratio of about 43% for Baa/BBB (medium grade) rated companies. • • •
>
> "In the case of oil pipelines, however, debt ratios are higher because of the use of the borrowing capacity of shipper-owners. It must be recognized that lenders are willing to commit funds to the debt securities of oil pipeline companies having such a high degree of leverage *only* because of shipper-owner support, be it direct or indirect (through completion, throughput and cash deficiency agreements). But, as noted above, such shipper-owner support, even if indirect, is in essence an additional equity investment of the parent company. Were support from financially strong shipper-owners not available, lenders would not permit such a high degree of leverage in oil pipelines even if the relative risk charac-

teristics of the pipeline in question were at the low end of the risk spectrum. Indeed, prior to the existence of the Consent Decree, the average of oil pipeline debt ratios was below 20%. • • •

"Because the Consent Decree has resulted in a high degree of leverage in the pipeline industry, each shipper-owner is using up a portion of its available borrowing capacity in support of the pipelines. Not only is the shipper-owner using up its borrowing capacity, which could otherwise have been used elsewhere, but it is also assuming *both* the credit and the business risks of the pipeline. This is a commitment of capital to the total cost of the pipeline, equivalent in substance to a direct equity investment. Consequently, in order to maintain its debt ratio at a level which preserves its financial integrity, the shipper-owner may be forced either to forego other investments or to sell additional equity." (Emphasis in original text.)

As Mr. Gary states, the fact that the parent assumes *both* the business risks and the credit risks of a pipeline subsidiary makes its investment in the subsidiary the equivalent of 100% equity investment. Dr. Ileo's recommendation in the *Nikiski* case that the capital structure of the parent be "flowed through" to the subsidiary is thus less favorable to the pipeline than would be treating the parent's investment entirely as equity, as Mr. Gary has shown would be justified.

If Dr. Ileo had utilized the methodology which he employed in the *Nikiski* case in this case, he would have found that Exxon's $6.27 rate results in a return on equity of only 12.56%. By contrast, the $3.90 rate derived under the

methodology adopted by Dr. Ileo solely for the purposes of this case produces a return on equity of only 5.1% under the methodology he espoused in the *Nikiski* case. Again, using the 14% return on equity sponsored by the Department of Justice and Dr. Ileo's *Nikiski* methodology, would produce a rate of $6.73, compared with the $4.19 rate the Department advocates. In turn, the $4.19 rate proposed by the Department of Justice results in a return on equity of only 6.0% (See Table 4).

TABLE 4

ALTERNATIVE EXXON RATES USING EXXON CORPORATION'S CAPITAL STRUCTURE AND METHODOLOGY SPONSORED BY DR. ILEO IN NIKISKI PROCEEDING

I. ALLOCATION OF EXXON TAPS INVESTMENT BASED ON EXXON CORPORATION'S CAPITAL STRUCTURE (1976)

	%	$ (000 omitted)
Debt	21.35	$ 393,523
Deferred Taxes	7.90	145,613
Equity	70.75	1,304,064
	100.00	$1,843,200

II. ALTERNATIVE TRANSPORTATION RATES BASED ON VARYING EQUITY RETURN RATES

A. Expenses (Millions of $)

Operating	$ 14.3
Maintenance	19.3
General	46.4
Depreciation	73.7
Removal and Restoration	16.4
Interest ($393.6 at 8%)	31.5
	$201.6

B. Rates Based on Various Returns on Equity

	Return on Equity				
	11%	12.56%	13%	14%	15%
Expenses (II.A. above)	$201.6	$201.6	$201.6	$201.6	$201.6
Federal Tax (48%)	132.7	151.2	156.8	168.8	180.9
State Tax (9.4%)	28.7	32.7	33.9	36.5	39.1
Return on Equity	143.7	163.8	169.8	182.8	195.9
Total Revenue Required	$506.7	$549.3	$562.1	$589.7	$617.5
Throughput ($\overline{M}$ Barrels/yr.)	87.6	87.6	87.6	87.6	87.6
Tariff Rate ($/bbl.)	$5.78	$6.27	$6.42	$6.73	$7.05

Protest Reply of Exxon Pipeline.

Apart from their unwarranted use of inappropriate capital structure to determine rates, Alaska and the Department of Justice are guilty of other errors. For example, the Department of Justice assumes that the appropriate rate of return on equity is independent of the debt/equity ratio. As shown in the Federal Power Commission's Recommendation to the President on the Alaska Natural Gas Transportation Systems, May 1, 1977, this assumption is contrary to all conventional financial wisdom. In that Recommendation, the FPC clearly illustrated that as the proportion of equity in relation to debt decreases, the return on equity properly increases. Thus, the FPC approved an 18% after-tax return on equity as just and reasonable, based on a 50/50 debt/equity ratio, reflecting an overall rate of return to cover debt and equity of 23%. At the same time, the FPC recognized that if the debt/equity ratio were 25/75, the equity return would properly be lower (13.7%), and, with a debt/equity ratio of 75/25, the return would be higher (31%). The FPC stated:

> "Such after-tax returns on equity are in line with the returns petroleum companies currently earn on their integrated operations, . . . *if comparable D/E ratios are assumed*". (Emphasis in original text.)

The Department of Justice, on the other hand, picked 14% as a rate of return on the basis of returns allowed to a gas pipeline, the Bell System, and Williams Pipeline without even investigating the debt/equity ratios of those companies, and then applied it uniformly to three different debt/equity ratios.

Furthermore, both Alaska and the Department of Justice make the same error as did the Bureau in assuming that the amounts collected to meet restoration and dismantling

costs are non-taxable, thus substantially understating expenses in their rate calculations.

Other than the adjustments set forth above to reflect the parent company's capital structure, Exxon has not attemped to restate the rate calculations made by Alaska and the Department of Justice to eliminate other errors; nor has Exxon attempted to determine an appropriate rate of return on equity, utilizing the pipeline's capital structure, which reflects the comparative risk of the TAPS project. The FPC's Recommendation clearly shows that with the debt/equity ratio proposed for TAPS standing alone, the rates of return on equity proposed by Alaska and the Department of Justice are absurd.

Given the fact that the capitalization calculations utilized by Alaska and the Department of Justice are clearly improper in light of Sections 15(7) and 19a of the Interstate Commerce Act, the only purpose in dealing with these calculations at all is to demonstrate that, if that methodology is properly applied, even using the data employed by Alaska and the Department of Justice for every element except capital structure, the 12.56% return on equity resulting from Exxon's $6.27 rate is clearly not unreasonably high.

VII. The Initial Rates Proposed by the Arctic Slope Regional Corporation are Clearly Inadequate

ASRC proposed as an initial rate for Exxon $3.27 per barrel. Such rate reflects a reduction of $3.00 below the rate in Exxon's tariff. Indeed, it appears that ASRC has simply deducted $3.00 from the rates of each of the TAPS carriers.

Perhaps not by coincidence, Exxon's per barrel costs, including operating expenses, depreciation, reserve for removal and restoration, interest, and income taxes, are

$3.27 per barrel. The rate proposed by ASRC thus provides no return on equity whatever and is clearly inadequate.

ASRC's other concerns are equally inappropriate. Its arguments concerning entry barriers precluding other producers from explorating new areas, which it alleges might result from an unlawfully high tariff assume that this Commission is not prepared to undertake the final determination of the lawfulness of the proposed rate in any reasonable time. Its contentions concerning delays in receiving its share of the royalty payments to Alaska are based on the same premise.

VIII. Although the Commission Has No Power to Impose a Refund Condition Exxon is Willing to Amend its Tariff to Adopt an Appropriate Refund Provision if its Rate is not Suspended

Protestants contend that the rates as filed should be suspended with leave given the TAPS carriers to refile on a lower basis of rates, with the lower rate made subject to a tariff rule providing for refund to shippers of any portion of those lower rates which the Commission, after investigation, finds to be unjust and unreasonable.

As Exxon has shown above, the Commission has no authority to coerce the acceptance of a lower initial rate through its suspension powers. Furthermore, although section 15(7) of the Act provides that if the Commission investigates, but does not suspend an *increased* rate filing, it may order the carrier to keep accurate accounts and to refund, with interest, to shippers any portion of the increase which, after its investigation, is found to have been been unjustified, this provision for refund does not apply to an initial rate, as the Bureau of Investigations and

Enforcement (p. 33) seems to recognize. Moreover, there is no implied authority for the imposition of such a condition in the exercise of the suspension power.[12]

If, however, the Commission determines to exercise its discretion to permit Exxon's tariff rate to take effect as filed, as we believe it must, Exxon is willing voluntarily to file a supplement to that tariff incorporating a refund rule as described below.

Such a refund rule will fully protect the crude oil shippers, the State of Alaska, and ASRC.[13] Exxon has no doubt that if a shipper receives a refund based on a determination that a transportation charge is unlawfully high, thus affecting the wellhead price of the crude oil transported, the owner of a market-value royalty would be entitled to recover its proportionate share of that refund.

12. The Bureau cites *Admiral-Merchants Motor Freight, Inc.* v. *United States,* 321 F.Supp. 353 (D. Colo.), *aff'd* 404 U.S. 802 (1971), as support for its contention that the Commission has authority to attach a refund condition to the TAPS initial rates. But that decision does not support the Bureau's argument. In the I.C.C. proceeding which culminated with *Admiral-Merchants,* the Commission had imposed the refund obligation as a condition to granting the carriers' motion for an extension of time. The court found the refund condition lawful as, in effect, a *quid pro quo* for the extension requested by the carriers. In the instant proceeding, in contrast, no similar benefit would be conferred upon the carriers as a tradeoff for a refund condition. Coercing carriers to file a rate below what they deem to be a reasonable level as the price of not having any rate at all, can hardly be deemed beneficial. For this reason, *Admiral-Merchants* does not support the imposition of a refund obligation on the initial rates filed by the TAPS carriers.

13. The Arctic Slope Regional Corporation suggests (pp. 21-22) that the refund rule would be inadequate protection in that even if the Commission should ultimately find some portion of the rates unreasonable the pipeline owner-shippers might refuse to apply for refunds. This argument is unfounded: the refund rule is self-executing, Ex Parte No. 281, *Increased Freight Rates and Charges* —1972, Order served May 14, 1973 (". . . respondents are obligated to comply with the refund rule, and no order should be necessary").

As to the rate of interest to be incorporated in such a refund rule, Exxon submits that the rate should not exceed 8 percent, rather than be fixed at 9 percent, as advocated by the Bureau of Investigation and Enforcement.[14] Eight percent is the rate which Exxon, by tariff rule, will charge shippers for delinquencies in the payment of transportation charges.

If the Commission authorizes it to do so, Exxon is willing to supplement its tariff (I.C.C. No. 125) issued June 8, 1977, on one day's notice, by adding thereto a refund rule essentially as follows:

"Special Rule No. 1—Provision for Refund:"

> "In the event that the Interstate Commerce Commission determines that any portion of the rate established hereby in the first instance for the movements from Prudhoe Bay to Valdez, Alaska exceeds a maximum reasonable level or is otherwise unlawful, and that determination is sustained on judicial review, carrier shall refund that portion of the rate in excess of the rate found to be just and reasonable, together with eight percent interest per annum from the date of payment."

14. The Commission has recently directed that an award of damages covering the period 1970-1974, for violation of Section 3(4) of the Act be paid with simple interest at *four* percent. *Investigation Into Lawfulness of Interchange Arrangements Between The Bangor and Aroostook Railroad and CP Rail at Brownsville Junction, Maine* (Docket No. 35940 *et al.,* Report and Order of the Commission, served February 11, 1977, p. 57). And in Ex Parte No. 318, the railroads incorporated in their master tariff, and the Commission found appropriate, a refund provision (Rule 13) with interest at the rate of *five* percent.

Protest Reply of Exxon Pipeline.

CONCLUSION

It is Exxon's position that the initial rate of $6.27 per barrel published in its tariff for transportation of crude oil from Prudhoe Bay to Valdez, Alaska, for shipment to points outside of Alaska cannot properly be suspended by this Commission. Whether tested by the conventional standards utilized by this Commission, or by the standards proposed by protestants, the $6.27 rate has not been shown by protestants to be unjust or unreasonable. Contentions with respect to this rate which require resolution on the basis of an evidentiary hearing can be dealt with in subsequent proceedings related to valuation or investigation of the rate. On the basis of the present submission to the Commission, the protests should be rejected and the petitions for suspension denied.

Respectfully submitted,

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Dated: June 22, 1977

[Appendices Omitted (reproduced in part in Vol. III)]
[Certificate of Service Omitted]

Reply of BP Pipelines Inc. to Petitions of the State of Alaska, Arctic Slope Regional Corporation, Department of Justice and Bureau of Investigations and Enforcement for Suspension and Investigation of its Initial Tariffs, June 22, 1977.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

[Caption Omitted]

BP Pipelines Inc. ("BP") acting through its undersigned counsel, hereby replies to the petitions of the State of Alaska ("Alaska"), Artic Slope Regional Corporation ("ASRC"), Antitrust Division, U.S. Department of Justice ("Justice"), and the Bureau of Investigations and Enforcement ("Bureau"), all dated June 15, 1977, to suspend and investigate BP's Tariffs 1 and 2. This reply is filed pursuant to Rules 42(a) and 200 of the Commission's General Rules of Practice and in accordance with Supplemental Notice concerning Filing of Protests and Replies to Initial Tariffs for the Trans Alaska Pipeline System ("TAPS") issued by the Commission on June 13, 1977.

INTRODUCTION

BP issued its Local Pipeline Tariffs 1 and 2 on June 3, 1977, effective June 20, 1977. Supplement 1 to I.C.C. 2 was issued by BP on June 15, 1977 with special permission of the Commission (77-4069) to postpone the effective date to June 30, 1977.

SUMMARY OF BP'S POSITION

This Commission should refuse to grant the requests for suspension and investigation for the following reasons:

1. The Commission lacks the statutory power to suspend BP's initial rates without a full hearing.

2. Suspension of BP's initial rates would prevent it from beginning operation in contravention of the Congress-

ional intent as expressed in the Trans Alaska Pipeline Authorization Act.

3. The Commission has no legal authority to suspend BP's tariff and require BP to file a lower tariff as suggested by protestants. To do so would be an unconstitutional taking of BP's property without due process of law.

4. The protestants have wholly failed to prove a prima facie case that BP's rates are unlawful.

1.

THE COMMISSION LACKS THE STATUTORY POWER TO SUSPEND BP'S INITIAL RATES WITHOUT A FULL HEARING.

The Commission has no statutory power to suspend an initial tariff of a new carrier like BP on the complaint of non-shippers, when BP has no other pipeline operations and consequently no revenues after suspension.

The Commission suspension powers are derived from 49 U.S.C. § 15(7), which reads in pertinent part as follows:

> "Whenever there shall be filed . . . a *new* . . . rate . . . the Commission shall have . . . authority . . . to suspend . . . but not for a longer period than seven months . . ." (Emphasis added.)

The Commission has the power, under 49 U.S.C. § 15(1) to cancel rates after they go into effect, but only after a full hearing.

49 U.S.C. § 15(1) reads in pertinent part as follows:

> ". . . *after a full hearing* . . . the Commission is authorized to determine and prescribe what will be the just and reasonable . . . rate." (Emphasis added.)

The present proceeding does not constitute a "full hearing" as required by Section 15 (1) of the Interstate Commerce Act or by the Administrative Procedure Act (5 U.S.C. §§ 555, 556, 557).

Section 556(d) of the APA reads in part as follows:

> "Every party shall have the right to present his case or defense by oral and documentary evidence, submit rebuttal evidence, and to conduct such cross-examination as may be required for all a full and true disclosure of the facts."

This right to a full hearing is strictly enforced. *Morgan* v. *U.S.*, 304 U.S. 1 (1938).

None of the cases cited by protestants as giving the Commission authority to suspend initial tariffs involve the suspension of the rates of a new carrier that has no other revenues, but involved individual rates that had a relatively minor impact on the overall revenues of the carriers. The question of whether the Commission had the power to suspend initial rates for a company starting in operation was not involved in any of the cited cases. None of the cases cited by the Bureau in footnote 11, page 12 of its protest involved the suspension power of the Commission under Part I of the Act. The only case found involving facts similar to those in this proceeding was in *The Matter of Wharfage Charges of the Galveston Wharf Company*, I & S. Docket No. 44 (1912) 23 I.C.C. 535, 537. In that case, Commissioner Harlow had this to say:

> "It was the first and only tariff of Galveston Wharf Company on file here, and an order suspending its operation *would have left the wharf company without any lawful rates and would therefore have obligated it either to cease its operations or to handle*

> ***the traffic of the port in violation of the act.*** ***We*** therefore allowed the tariff to go into effect . . ." (Emphasis added.)

Assuming *arguendo* that this Commission has the statutory authority to suspend initial tariffs, it would be a gross abuse of discretion for this Commission to suspend BP's initial tariffs and leave them with no revenues whatsoever on a $1.3 billion investment.

2.

SUSPENSION OF BP'S INITIAL RATES WOULD PREVENT IT FROM BEGINNING OPERATION IN CONTRAVENTION OF THE CONGRESSIONAL INTENT AS EXPRESSED IN THE TRANS ALASKA PIPELINE AUTHORIZATION ACT.

The legislative history of the Trans Alaska Authorization Act, 43 U.S.C. § 1651-55 reflects that Congress considered that the completion and operation of TAPS was urgently necessary in the public interest. Certainly, Congress did not anticipate that this Commission would suspend the operation of this vital facility when all of the parties' interest can be adequately protected by following Commission procedures. (Senate Report No. 93-207, 93rd Cong., 1st Sess., U.S. Code Congressional and Administrative News, 1973, page 2417, et seq.)

3.

THE COMMISSION HAS NO LEGAL AUTHORITY TO SUSPEND BP'S TARIFF AND REQUIRE BP TO FILE A LOWER TARIFF AS SUGGESTED BY PROTESTANTS. TO DO SO WOULD BE AN UNCONSTITUTIONAL TAKING OF BP'S PROPERTY WITHOUT DUE PROCESS OF LAW.

Alaska suggests that this Commission coerce BP into accepting a suspension and refiling at $4.42 per barrel.

ASRC would accept $3.04 per barrel. Justice suggests a range of $4.23 to $4.83 per barrel depending on a hypothetical debt/equity range. The Bureau came up with a BP tariff of $4.59 per barrel. No two protestants used the same formula or the same assumptions. Nor did any two protestants come up with the same relationship between BP and the other TAPS carriers.

Should this Commission attempt to coerce BP into filing a lower tariff in the recommended or any other prescribed range, this would constitute illegal ratemaking, would violate the Administrative Procedure Act requiring a full hearing prior to establishing a tariff, and would be confiscatory and an unconstitutional denial of due process under the Fifth Amendment to the United States Constitution. *Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir., 1970).

THE PROTESTANTS HAVE WHOLLY FAILED TO PROVE A PRIMA FACIE CASE THAT BP'S RATES ARE UNLAWFUL.

There is no presumption of wrong arising from BP's tariff filing. Indeed, the presumption of honest intent and right conduct attends its action. Accordingly, this Commission requires that a prima facie case of unlawfulness be presented by the protesting parties before its power to suspend is exercised. The suspension procedure is comparable to a restraint proceeding in a court of equity. It is an extra ordinary remedy which the Commission historically exercises with restraint. (*Ratemaking Powers of the Interstate Commission,* by former Chairman Howard Freas, 31 George Washington Law Review, Oct. 1962, page 54, at page 67.)

The only real issue of unlawfulness in this proceeding is whether the rates are "unjust and unreasonable" under Section 1(5) of the Interstate Commerce Act (49 U.S.C.

§ 1(5)). To meet their burden of proof to justify a suspension, protestants must allege and prove that the tariffs are clearly excessive.

We see no necessity to catalogue all the unsupported generalizations in the various protests, and we will not spend time responding to speculation as to what might be proven in the future. An evidentiary hearing is the proper and only place to join issue on the facts and test the evidentiary support for the allegations of a complaint. We will, however, note some of the more glaring defects and omissions in the presentations of the protestants.

The principal underlying thesis of the protests appears to be that the Commission should, in this summary proceeding involving eight out of more than 100 oil pipeline companies, make a radical regulatory departure from 70 years of pipeline regulation. This Commission has always recognized the different regulatory standards which properly apply to oil pipelines under the Interstate Commerce Act as opposed to those applied to certificated public utilities. Oil pipelines have been recognized as "a unique type of transportation system." *United States Department of Defense* v. *Interstate Storage and Pipeline Corp.*, 353 I.C.C. 397, 404 (1977). If what has heretofore been a highly successful mode of regulation of pipelines as competitive common carriers is to be abandoned, it should not first be done in a summary protest proceeding involving the initial tariffs of eight pipeline companies and a large project having no operating history. Questions on the methodology and application of valuation and on proper standards for measuring tariff reasonableness are of great significance, and their determination can have far reaching impact on a multi-billion dollar American industry. Decisions on these questions must be deferred to a proceeding affording time

and opportunity to all interested parties for full presentations and reasoned deliberations. The Commission's Ex Parte No. 308 is just such a proceeding.

In making their arguments for a utility type rate of return on equity, the protestants gave no recognition to the realities of oil pipeline financing and capital structure. The high debt/equity ratios indicated on the books of the pipeline companies which owns TAPS do not reflect the real investment in those companies by their parent owners. BP's parent shareholder has put more at risk in the venture than a capital contribution of 15 percent. It has also unconditionally guaranteed all of BP's debt borrowings. As an independent company without these financing guarantees, BP could not have attracted the required capital for its participation in TAPS.

Analysis in terms of traditional shareholder equity investment where liability is limited to the investment cannot meaningfully apply where the shareholder has unlimited liability for all the corporation's debt as well as for contributed capital. As stated by Mr. Raymond B. Gary at page 8 of his testimony in Ex Parte No. 308.

> "In this sense the high debt ratios of oil pipeline companies are misleading since the shipper-owners are responsible for the total capitalization, both debt and equity. In essence, the debt supported by the shipper-owners could be viewed as equivalent to an equity investment because the shipper-owners are bearing the risks of business failure of the pipeline operations. The end result is that the shipper-owners have dedicated one of their valuable assets, namely their borrowing capacities, to assist in financing pipeline systems."

Although the State of Alaska's protest fails to speak of the special relationship between the pipelines and their

parents, the State's witness, Dr. Michael J. Ileo, is certainly sensitive to the difference between a financially independent company and a pipeline subsidiary. In his written testimony before the Alaska Pipeline Commission in *Nikiski Alaska Pipeline Co.*, Dockets P-76-3 and P-77-3 (March 14, 1977) he said:

> "However, it would be incorrect in my judgment to treat Nikiski as if it were an independent company as long as it is wholly owned by Tesoro. This is the case because all of the capital of Nikiski is raised by Tesoro. Moreover, despite the fact that Nikiski appears to be nearly 100% debt financed by Tesoro, it is truly financed by the consolidated capital structure of Tesoro just as any wholly owned operating subsidiary of Tesoro. The fact that Nikiski would never have been constructed without the financial backing of Tesoro, as reflected in the testimony of Tesoro, clearly reflects this situation."

In the *Nikiski case*, Mr. Ileo applied the debt/equity structure of the parent company (37.3 percent debt) rather than of the pipeline company (100 percent debt) and recommended a 13 percent return on the parent's equity structure in determining a fair rate of return.

Combined debt/equity ratios for 29 integrated petroleum companies are presented in Exhibit F of the Bureau's protest, and they show a 1975 ratio of 24 percent debt.

In any event, Alaska cannot make a prima facie case of illegality by presenting a theory of regulation which has never been recognized by this Commission. Alaska bases its entire case on a statement by Dr. Michael J. Ileo. Dr. Ileo calculated, what he considered as fair rates of return for the BP solely on the basis of common equity returns on an original cost rate base (Schedules 6A, 6B), methods

which have never been employed by this Commission and were rejected in all of the *Williams Brothers* cases. In Nikiski, Dr. Ileo had this to say:

> "The I.C.C. with regard to pipelines, the Hope[1] principles are not applicable and hence you can't compare rates of return for one entity whose . . . for which the Hope principles are applicable, to another entity where the Hope principles are not applicable." (Tr. 267, March 30, 1977)

The Commission, in its Order of December 3, 1976, in *Williams Brothers* Docket 35533, stated:

> "Use of either original cost or actual net investment as the rate base would be such a fundamental change from previous policy that it may not properly be adopted for the first time in a proceeding involving the existing rates of a particular pipeline."

If the Commission considered that such fundamental changes in policy should not be made in *Williams* after a full hearing, then such changed theories and method certainly should not be applied in a suspension proceeding.

The protestants would also eliminate or radically alter the Commission's valuation procedures. As stated above, this is not the proceeding to undertake such a task, and Section 19a of the Act cannot be amended here. For purposes of its recent submission to the Commission on its tariff, BP calculated its estimated valuation in accordance with the instructions of Mr. William T. Bono, Chief, Section of Cost and Valuation, in his letter of April 22, 1977 and as detailed by Mr. Jesse C. Oak, Senior Valuation Engineer in his testimony in Ex Parte No. 308.

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1. The *Hope case* (*F.P.C.* v. *Hope Natural Gas*, 320 U.S. 591 (1944) is the classical monopolistic utility-original cost-return on equity case.

Protest Reply of BP Pipelines.

The return on valuation which is a measure of a proper tariff levels is currently being reviewed in Ex Parte No. 308. The testimony in that proceeding by Mr. Raymond B. Gary supports returns of 13 to 14 percent for minimum risk pipelines. The Bureau proposes a 10 percent return on valuation as a proper interim measure of tariff reasonableness, but it did not indicate how that rate was developed. While the Bureau suggests an increase from 8 to 10 percent as the guideline on valuation returns, it proposes an increase from 4 to 9 percent when discussing interest on refunds since the 4 percent rate adopted in 1946 "has outlived its relevance." An example of the inadequacy of a 10 percent return is BP's average interest cost of almost 9.6 percent.

The testimony in Ex Parte 308 by Mr. Raymond B. Gary supports returns of 13 to 14 percent for minimum risk pipelines. With an optimistic assumption of a full level throughput of 15.84 percent of 1.2 million barrels per day throughout 1978, BP's tariff will not result in a return on valuation in excess of this rate.

We note that the Bureau has emphasized that rates should be cost based with cost differences warranting different rates. The Bureau proposed rates, however, would run counter to this rule and give the carriers with the higher costs the lower rates.

The protestants have failed to give recognition to the fact that all of the pipeline companies are not owned by parents who also own North Slope production in similar proportions to the pipeline ownership. The parents of Union and BP are not North Slope producers. Without the comforting assurance that owner-produced oil will be available for shipment through our pipeline space, we are subject to greater risks of throughput and revenue variations when production is reduced.

Protest Reply of BP Pipelines.

None of the protestants has proposed a meaningful test year or given any recognition to the projected realities of the first year's pipeline operation. If we apply the highest of the tariff rates urged by protestants to an assumed throughput for 1977 which makes no allowance for operational delays or shortfalls, the resulting revenues fail to afford BP Pipelines sufficient return for coverage of its interest costs. This is demonstrated on Attachment A to this response.

As stated by Dr. Michael J. Ileo in his testimony in FPC Docket No. 20376 at page 17: "Under most regulatory statutes, utility rates cannot be so low that they are confiscatory; they must be at least sufficient to cover debt cost."

We submit that the protestants in this proceeding have failed to give the Commission any proper basis for the establishment of a lower tariff rate. Any forced reduction in the rate in this proceeding would be procedurally and constitutionally confiscatory, and the rates proposed by protestants would also be confiscatory in a very real economic sense.

Conclusion

This Commission has successfully regulated oil pipelines since 1906, recognizing that because of their shipper owner relationships, pipelines are unlike no other regulated business.

The Commission, through its sensible regulations, has promoted a pipeline network that is unique to this country and has contributed greatly to this country's high standard of living. Unlike other forms of transportation, oil pipelines have been built by private capital without government subsidies. The pending legislation in Congress to create a Department of Energy would transfer I.C.C. regulations over oil pipelines and FPC regulations over gas pipelines.

According to the Oil & Gas Journal, June 13, 1977, page 19, the FPC will transfer 1,458 employees to the new department as compared with 17 employees from the I.C.C. The difference in these numbers may help to explain the greater health and vitality of the oil pipeline industry as opposed to the gas industry. Being uncertificated, and having limited customers, oil pipelines are completely unlike monopolistic public utilities.

No shippers have protested BP's tariffs. Alaska and ASRC filed their protests to reduce the rates so as to increase the price of North Slope crude and the state's royalty and tax revenues. Justice and Bureau are using this forum to urge changes in the Commission's regulatory practices to utility type regulations.

None of the protestants claim that the BP rates, or that of the other carriers, are out of line with the earnings of other oil pipelines in this country—earnings which are well known to this Commission and have been reported to Congress. The reason this comparison was not made is obvious, the TAPS owners have posted tariffs which will result in lesser rates of earnings than those of many other pipelines. All of protestants assume, without factual support, that the valuations and depreciation rates are excessive. They ignore the fact that valuation and depreciation proceedings are now underway in accordance with this Commission's procedures. Alaska has spent substantial sums in developing testimony for those two proceedings.

BP has serious doubts as to whether the Commission has any statutory power to suspend BP's initial rates and leave it with the dilemma of going out of business or accepting a permanent loss of revenues without the opportunity to a full rate hearing. Assuming, *arguendo*, that the Commission has the power, it would be a gross abuse of the Commission's discretionary authority to suspend rates on new

theories or utility principles that have not been heretofore applied by the Commission.

A suspension placing BP under economic duress to file a lesser rate as suggested by protestants, would, under the circumstances, be illegal ratemaking without a full hearing as required by the Interstate Commerce Act and the Administrative Procedure Act, and would constitute an illegal taking of BP's property in violation of the due process clause of the United States Constitution.

Although Alaska is not a shipper and thus not entitled to reparations directly, in the event this Commission ultimately finds that the rates are excessive and orders reparations, these reparations will be available for flow through to Alaska.

BP respectfully submits that protestants have wholly failed to make a prima facie case of unlawfulness and that suspension of BP's tariffs should be denied. Protestants will have their day in court in the pending valuation, depreciation and rate hearings and can suggest changes in methodology in Ex Parte No. 308. In the meantime, all of the protestants' rights are adequately protected by the reparation provisions in the Interstate Commerce Act.

Protest Reply of BP Pipelines.

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Protest Reply of BP Pipelines.

ATTACHMENT A

BP PIPELINES INC.

1977 Operating Results Based on $4.59 Tariff and Maximum Throughput For Operations Commencing August 1, 1977

Throughput (million barrels)	20
Operating Revenue at $4.59 tariff	91.8
Operating Expense:	
Depreciation	24.9
Dismantling/Restoration	2.8
Other Operating Expenses	27.6
Net Carrier Operating Income	36.5
Interest Expense	47.9
Income Tax	—
Net Income	(11.4)

NOTE: Based on the tariff proposed by Dr. Ileo, $4.42, BP's interest expense would still not be covered after eight months of operation at full throughput.

Response of ARCO Pipe Line Company to Protests and Petitions for Suspension and Investigation of ICC Tariff No. 1030, June 22, 1977.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

[Caption Omitted]

RESPONSE OF ARCO PIPE LINE COMPANY TO PROTESTS AND PETITIONS FOR SUSPENSION AND INVESTIGATION OF ICC TARIFF NO. 1030 ISSUED MAY 31, 1977

Protest Reply of ARCO Pipe Line.

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RESPONSE OF ARCO PIPE LINE COMPANY TO PROTESTS AND PETITIONS FOR SUSPENSION AND INVESTIGATION OF ICC TARIFF NO. 1030 ISSUED MAY 31, 1977

On May 31, 1977, ARCO Pipe Line Company ("ARCO Pipe Line") issued its initial tariff for the transportation of petroleum through its portion of the Trans Alaska Pipeline System ("TAPS"). On June 15, 1977, protests and petitions for suspension and investigation of that initial tariff, and of the initial tariffs issued by six other owners of undivided interests in TAPS, were filed by the State of Alaska ("Alaska"), the Antitrust Division of the Department of Justice ("Antitrust Division"), the Bureau of Investigations and Enforcement of the Interstate Commerce Commission ("Bureau"), and the Arctic Slope Regional Corporation ("ASRC"). Pursuant to the Commission's "Supplemental Notice Concerning Filing of Protests and Replies to Initial Tariffs for the Trans Alaska Pipeline System," issued June 13, 1977, ARCO Pipe Line hereby responds to the various protests and petitions filed with respect to its initial tariff.

The four protests can be dealt with as a group. They seek, with variations in detail, similar action from the Commission. They rest, again with minor deviations in detail, upon faulty notions of proper Interstate Commerce Commission procedure, of applicable law, and of public policy. Furthermore, all of the protests appear to be based upon concepts for determining rates of return which are either wholly untutored in sound economic principles or deliberately calculated to stampede this Commission into improvident and unlawful action.

SUMMARY OF RESPONSE

All of the protestants seek to have this Commission hurriedly rewrite its long-standing procedures for determining the allowable rate of return for petroleum pipelines in the context of a suspension proceeding, a proceeding which is summary in nature and which was never intended by statute, Commission regulation or established Commission practice to be the forum for revising rules or weighing disputed factual or economic contentions. Were the Commission to do what the protestants ask, it could not fail to act in violation of law. In addition, without benefit of a fuller record such actions would necessarily be arbitrary and capricious. The Commission would be compelled to reject its own ruling, announced just last December,[1] establishing the proper respective roles of individual pipeline tariff proceedings and the ongoing Ex Parte No. 308 rulemaking proceeding in which rate-of-return methodology for petroleum pipelines is receiving orderly and intensive consideration. Furthermore, the action which each protestant urges upon the Commission would have the Commission embrace a concept of rate-making which is not only new, but based upon wholly unsound economic principles. Indeed it would require acceptance of principles at odds with the recent testimony of the only economic "expert" whose views are made a part of any of the protests.[2]

Finally, the fundamental flaw of all of the protests, apart from the unlawful procedure which each of them suggests, is that they ignore the ability of the Commission, acting in

1. Petroleum Products, Williams Brothers Pipeline Company, Docket No. 35533, decided December 3, 1976.

2. Testimony of Michael J. Ileo before the Alaska Pipeline Commission, APC Docket Nos. P-76-3 and P-77-3, March 14, 1977 at 62, discussed *infra* at 48-50.

strict compliance with law, to protect the interests of both carriers and protestants. The Interstate Commerce Act contains specific, fair and adequate mechanisms by which those who are injured by a tariff ultimately found to be too high can be compensated for any damage. But the Interstate Commerce Act contains no similar protection for the carrier whose tariff is set too low. The carrier has no right of recoupment of the undercharge forced upon it, and appears to be precluded from making up for its losses or its unfairly constrained profits in subsequent years of operations. Under these circumstances, the equities are clear, and define the proper course of action for the Commission:

(1) Allow the tariffs here at issue, tariffs presumptively lawful under the Interstate Commerce Act, to become effective June 30, 1977;

(2) Order an investigation of the tariff rates and charges,[3] which investigation will satisfy the legitimate concerns of all protestants for impartial examination of the rates and charges;

(3) Instruct the ICC staff and the Administrative Law Judge or Commissioner designated to preside over the investigation to conduct it with all dispatch consistent with proper, thoughtful and careful consideration of the complex factual, economic and policy issues involved and with due regard for the rights of all parties.

This is a course of action consistent with law. It is a course of action consistent with ICC practice. And it is

3. The Commission, by its Order of June 17, 1977, has already ordered an investigation of the Rules and Regulations contained in the tariffs here at issue.

the only course of action which is fair to all parties, carriers and protestants alike.

I. THE COMMISSION LACKS AUTHORITY TO GRANT THE RELIEF REQUESTED BY THE PROTESTANTS.

All four of the protestants ask the Commission to suspend the proposed rate, with leave to refile at a prescribed lower rate, which would be effective on short notice. This requested relief is premised on two assumptions: (1) that the Commission has the power to suspend an initial, as opposed to a changed, rate, and (2) that the Commission can, prior to investigation, effectively prescribe a rate by requiring the carrier to elect between not operating at all and "voluntarily" canceling its tariff and refiling at a lower rate named by the Commission. Both of these assumptions are erroneous.

Moreover, two additional forms of relief requested by the Bureau (imposition of a refund condition and a requirement that the carriers furnish certain information outside the scope of discovery permitted by the ICC General Rules of Practice) are also beyond the authority of the Commission in this proceeding.

A. The Commission Does Not Have Authority To Suspend An Initial Rate.

All of the protestants assume the Commission has the authority to suspend the initial rates contained in the tariffs here at issue. That assumption is at odds with the language of the applicable statute, its legislative history, and the Commission's overall rate-making framework.

The protestants hinge their suspension claims on Section 15(7) of the Interstate Commerce Act ("Act"), 49 U.S.C. § 15(7), which provides that:

> Whenever there shall be filed with the Commission any schedule stating a *new individual or joint rate,* . . . the Commission shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, . . . and pending such hearing and the decision thereon, the Commission . . . may . . . *suspend the operation and defer the use of such rate,* . . . but not for a longer period than seven months beyond the time when it would otherwise go into effect. . . . [Emphasis added.]

The term "new" rate, protestants assert, includes an initial rate such as that here involved.

A reading of Section 15(7) in its entirety, however, belies that assertion. In that subsection the term "new" rate is used interchangeably with the term "changed" rate. The next sentence provides that if, during the seven-month suspension period, "the proceeding has not been concluded and an order made . . . , *the proposed change of rate* . . . shall go into effect at the end of such period." (Emphasis added.) The statute makes no similar provision for anything other than a "changed" rate. Under settled Commission law, it is clear that a "changed" rate is one that modifies an existing rate of the same nature.[4] The term "change" of rate thus excludes an "initial" rate. As a result, either the term "new" rate must be read as synonymous with a "changed" rate (*i.e.*, not an "initial" rate), or the Commission would be faced with an anomalous situation where the suspension power would be applicable to an "initial" rate but the seven-month limitation would not. The latter interpretation would create an irreconcilable contradiction within the Act, as well as a clearly incorrect result.

4. *See, e.g.*, Animal Food, Middlewest to California, Idaho, and Utah, 332 I.C.C. 87, 88 (1967); Minimum Rates or Changes in Trunkline or New England Territories, 34 M.C.C. 776, 777 (1942).

The conclusion that "new" rate does not include "initial" rate is buttressed by the recent decision in *Delta Air Lines* v. *CAB*, 543 F.2d 247 (D.C. Cir. 1976). The court was faced with a petition to review the Civil Aeronautics Board's rejection of revised tariffs filed by several airlines. Examining the suspension provision in Section 1002(g) of the Federal Aviation Act,[5] which is patterned after Section 15(7) of the Interstate Commerce Act,[6] the court noted:

> This section gives the Board . . . authority over *"new," as opposed to initial, tariffs (i.e., tariffs which state a rate, rule, or regulation different from that in an existing, effective tariff covering the same service)* . . . . [543 F.2d at 254 (emphasis added).]

Within the context of the statute, then, "new" refers to "changed" but not "initial" rates, and the suspension power is not applicable to "initial" rates.[7]

In addition to the language of Section 15(7), the legislative history of that provision is wholly consistent with the view that Congress was limiting the suspension power to changed rates. The genesis of the suspension provision

5. 49 U.S.C. § 1482.

6. Section 1002(g) contains a proviso that the suspension provision "shall not apply to any initial tariff filed by any air carrier." In enacting that proviso, Congress made clear its intention to track the Interstate Commerce Act. *See* Senate Comm. on Interstate Commerce, 74th Cong., 1st Sess., Report on S. 3027 (Comm. Print Aug. 9, 1935) (citing Section 15(7) as a model for the Section 1002(g) suspension provision, including the language regarding initial tariffs). The result was a paraphrase of Section 15(7) that included an express statement of the lack of power to suspend initial tariffs.

7. *See also* Salt From Louisiana Mines to Chicago, Ill., St. Louis, Mo. and Intermediate Main Line Points, 69 I.C.C. 312, 313 (1922) ("By [Section 15(7)] we are given authority to determine the 'lawfulness' of a 'new' rate, *whether it be increased or decreased.*") (Emphasis added).

was the Commission's frequently expressed view that, in order adequately to prevent railroad abuse of shippers, it required authority to restrain "advances," or increases, in rates. The most effective grant of authority, the Commission suggested, would be the power to maintain the "status quo while proceedings are pending to test the reasonableness of the *advance.*"[8]

Congress responded to the Commission's recommendations by passage of the Mann-Elkins Act.[9] As had been the case in the ICC, the pervasive focus of the Congressional hearings,[10] committee reports,[11] and floor debates[12] leading up to the Mann-Elkins Act was on the problem of rate *increases*, and not initial rate filings. The resulting use of the terms "new" and "changed" rate, as distinguished from "initial" rate, cannot be written off as meaningless.

While the Commission has nevertheless occasionally asserted its authority to suspend initial tariffs, the circumstances of those cases illustrate that the suspension power does not extend to initial tariffs of the type now before the

8. Twenty-First Annual Report of the Interstate Commerce Commission 9-10 (1907) (emphasis added). *See also* Twenty-Second Annual Report of the Interstate Commerce Commission 10-12 (1908); Twenty-Third Annual Report of the Interstate Commerce Commission 6-7 (1909).

9. 34 Stat. 589 (1910). *See generally* 1 Sharfman, The Interstate Commerce Commission at 201-02 (1931); Arrow Transportation Co. *v.* Southern Ry., 372 U.S. 658, 662-66 (1963); Hope Natural Gas Co. *v.* FPC, 196 F.2d 803, 806-07 (4th Cir. 1952).

10. *See, e.g.,* Hearings on Bills Affecting Interstate Commerce Before the House Comm. on Interstate and Foreign Commerce, 61st Cong., 2d Sess. 1174, 1268 (1910) (Statements of ICC Commissioners Knapp and Clements).

11. *See, e.g.,* H.R. Rep. No. 923, 61st Cong., 2d Sess. 165 (1910).

12. *See, e.g.,* 45 Cong. Rec. 3446 (1910) (remarks of Sen. Elkins); 45 Cong. Rec. 3373 (1910) (remarks of Rep. Cummins).

Commission. None of the cases cited by the protestants as illustrative of initial tariff suspensions resulted in an order that had the effect of entirely precluding the transportation of the goods.[13] Rather, all of those cases involved initial tariffs that were simply designed to add some new service to the carrier's existing business on the same general route, and indeed, in some of the cases the particular respondent carrier was able to move the goods in an alternative manner.[14]

The significance of these distinctions is that they emphasize the fact recognized by all of the protestants—that a suspension order would be a wholly inappropriate remedy in response to initial tariffs of this sort, where the effect would be to restrain entirely the movement of any North Slope oil, either by these or any other carriers. In fact, none of the protestants has seriously argued that the tariffs here involved should be made subject to an outright seven-month suspension during which no rates would be in effect, and no interstate transportation of the petroleum would be possible.

Rather, they all propose suspension primarily as a device to impose unlawful interim tariffs. In addition, the Bureau views the asserted suspension power as an economic club to be used by the Commission to circumvent the

13. *See, e.g.,* Foodstuffs and Agr. Commodities, Cal., and Ariz., to W. and S.W., 329 I.C.C. 321 (1966); Animal Feed From Miss. and Tenn. to Midwest and S.W., 316 I.C.C. 94 (1962); Barge-Rail Coal From Huntington, W.Va., to Chicago Dist., 315 I.C.C. 129 (1961); Clay From Greybull, Wyo., to Points in the Middle W., 314 I.C.C. 705 (1961); Bituminous Coal Via Motor-Rail From Lynnville, Ind., to Chicago, Ill., 313 I.C.C. 573 (1961); Machinery From Salt Lake City—International Transp., Inc., 304 I.C.C. 286 (1958).

14. Animal Food, Middlewest to Calif., Idaho, and Utah, 332 I.C.C. 87 (1967); Rail-Water, Grain in Bulk, Mo., Ill., and Ind. to Buffalo, 321 I.C.C. 564 (1963); Cotton From New Orleans, 49 I.C.C. 751 (1918).

structure of the Interstate Commerce Act by imposing an unlawful refund provision, as well as to subvert the Commission's Rules of Practice by compelling discovery unauthorized by those Rules. The Commission lacks authority to adopt that approach, and should allow tariffs to go into effect pending an investigation into the lawfulness of the rates.

B. The Commission Lacks Authority to Prescribe Interim Rates Without a Full and Fair Hearing.

Central to the Commission's rate-making scheme is the proposition that rates are to be fixed by the carrier in the first instance. *See, e.g., Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932); *Hanna Mining Co.* v. *Missouri Pac. R.R.*, 332 I.C.C. 166, 171 (1968). Under Section 15(1) of the Act, 49 U.S.C. § 15(1), the Commission is not itself empowered to prescribe rates, except on review of those established by the carrier, and then only after "full hearing" and a finding that the rate fixed by the carrier "is or will be unjust or unreasonable . . . or otherwise in violation of [the Act]."

The Commission thus cannot prescribe rates (whether denominated "interim" or not) on a summary examination of tariffs or a mere suspicion that they are too high, but rather must afford a full hearing to test the lawfulness of the rates.[15] The Supreme Court has made clear that this

15. At that required hearing, the burden is squarely on the protestants to prove the unlawfulness of the initial rate. As recognized by Alaska and the Bureau, Section 15(7) places the burden of proof on the carrier only where a changed rate, and not an initial rate, is challenged. *See* Bureau Protest at 34-35; Alaska Protest at 19. *See also, e.g.,* Animal Feed from Mississippi and Tennessee to Midwest and Southwest, 319 I.C.C. 257, 259 (1963); Bituminous Coal Via Motor-Rail from Lynnville, Indiana to Chicago, Illinois, 313 I.C.C. 573, 574 (1961). The contrary argument of the Antitrust Division (at 8-9) and ASRC (at 16) is simply wrong.

is not a technical requirement, but a mandate that a truly "ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."[16]

Under Section 15(1), then, the imposition of an interim rate at this time would be unlawful. The skeletal, conclusory submissions to which the Commission now has access can hardly be said to constitute the full record that the statute requires before a rate can be prescribed. Indeed, the Commission is at an even greater disadvantage here than in the ordinary case. The initial tariffs at issue in this proceeding concern a new pipeline, transporting goods over a route previously not available to shippers, and there is no useful closely comparable experience upon which the Commission might draw to arrive at a range of presumptively lawful rates.

In short, given the limited state of its knowledge and the absence of relevant background information, the Commission cannot properly conclude that the initial rates proposed by the carriers are unlawful, and that some other rate can be taken as permissible pending the outcome of an investigation. The imposition of an interim rate at this time would constitute a clear violation of Section 15(1).

C. Suspension With Leave to Refile at A Suggested Rate is Tantamount to a Prohibited Prescription of Rates by the Commission.

Protestants attempt to circumvent the plain dictates of Sections 15(1) and (7) by proposing that the Commission

16. *Akron, C. & Y. Ry.* v. *United States* (The New England Divisions Case), 261 U.S. 184, 200 (1923). *Cf. North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 748-49 (D. Del. 1961) (holding that the entire statutory scheme precludes a summary finding that challenged rates "are unlawful per se and require cancellation".)

suspend the initial rates proposed by the carriers, but grant the carriers leave to cancel their initial tariffs and to file substitute initial tariffs on short notice at suggested lower rates. This approach is a transparent attempt to accomplish indirectly what the Commission cannot do directly—prescribe rates without a full hearing.

The courts have consistently rejected similar attempts to ignore statutory commands that rates are to be initiated by carriers, and are to be revised by the agency only upon a full hearing and a finding that the rates are unlawful. In *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970), the major domestic air carriers filed with the Civil Aeronautics Board tariffs that provided for rate increases. After oral argument scheduled on its own motion, the Board found that the tariffs "may be" unlawful and ordered the tariffs suspended and investigated. It further found, however, that the carriers had demonstrated a need for some additional revenue. It, therefore, "outlined its own fare formula and announced its decision to 'permit tariff filings implementing' that formula to be filed without suspension . . . ." 430 F.2d at 894-95. The Board stated that it "would 'be disposed to grant an increase' " which adhered to its plan, *id.* at 896, but warned that rates above the prescribed maximum "would be viewed *prima facie* as outside the realm of justness and reasonableness and would ordinarily be suspended and ordered investigated." *Id.* at 897. The carriers thereafter withdrew their tariffs and substituted new tariffs in accordance with the Board's plan.

On review of the Board's order, the court of appeals reversed. It flatly rejected the Board's contention that because the carriers were not legally bound to refile based on the formula set out in the Board's order, there had been no prescription of rates. The Court characterized this as a "legalistic reading of the statute." *Id.* at 895.

The court went on to conclude that "these rates . . . have been determined by the Board. . . ." *Id.* at 896.

> It would be blinking reality to hold, as the Board argues, that the order of September 12 did no more than suspend and initiate an investigation of the rates proposed by the carriers. . . . The Board did all that it could, short of formally styling its order as rate-making, to induce the carriers to adopt the proposed rates. [430 F.2d at 897-98.]

Subsequent cases have read *Moss* as permitting judicial scrutiny of " 'sham' suspensions aimed at coercing behavior rather than merely preserving the status quo pending investigation." *Continental Airlines* v. *CAB*, 522 F.2d 107, 129 (D.C.Cir. 1975). In *SCRAP* v. *United States*, 346 F. Supp. 189 (D.D.C. 1972) (three-judge court), *rev'd on other grounds*, 412 U.S. 669 (1973), the court stated that "[a] suspension decision which effectively blackmails the carriers into submitting agency-authorized rates is functionally indistinguishable from an agency order setting those rates. . . ." 346 F. Supp. at 197.

The protestants to the initial tariffs here at issue propose an approach indistinguishable from that rejected in *Moss*. The Bureau, for example, requests that the Commission include in its order "special permission . . . to cancel the proposed rates, and to file and to make effective the following rates on not less than one day's notice pending the hearing and decision in the ordered investigation." Bureau Protest at 40. The Bureau then lists a specific rate for each carrier, substantially below those contained in the respective initial tariffs. *Id.* at 41. Incredibly, it argues that *Moss* can be avoided by this approach because (1) the Commission would "include a statement in its order that it is not prescribing rates," and (2) the suggestion of permissible

interim rates "would in no way prejudge the outcome of its investigation of the lower rates." *Id.* at 13. As in *Moss*, 430 F. 2d at 897-98, "[i]t would be blinking reality" to conclude that leave to refile at a specified interim rate would be anything less than the *de facto* prescription of rates by the Commission without a full and fair hearing.

To the contrary, the imposition of "suggested" rates which the carriers would be permitted to put into effect would produce precisely the sort of coercion, with all of the attendant risks, that concerned the *Moss* court. Even more so than in *Moss*, the Commission here would be acting with a nearly total absence of relevant facts. As shown *infra*, the matters that a full investigation and hearing would necessarily inquire into are unusually complex, difficult and novel. Moreover, as noted earlier, the Commission in this case lacks the pool of applicable acquired experience which it has in most matters before it and which the CAB had in *Moss*. Thus, on the present state of the record, the "suggestion" of rates by the Commission would be wholly without basis, and would completely subvert the statutory scheme.

Equally importantly, the suggestion of rates, backed by a threat of suspension of the carriers' proposed rates, would place the carriers in a grossly unfair position. Their only alternatives would be to hold to their initial tariffs, and thereby face a seven-month suspension during which no Alaskan oil would be transported, or to accede to the Commission's "suggested" rates and adopt them as their own. The economic coercion is apparent. *Cf. Consolidated Edison Co.* v. *FPC*, 512 F.2d 1332, 1340-41 (D.C.Cir. 1975). If the Bureau's suggested procedure were invoked, the carrier's discretion to set rates, as guaranteed by the Act, would be "so circumscribed as to [be] almost nonexistent." *National Association of Motor Bus Owners* v. *FCC*, 460 F.2d 561, 567 (D.C.Cir. 1972).

The Bureau asks the Commission to force the carriers to choose between (1) allowing an $8 billion dollar investment to remain idle, thereby delaying the arrival of North Slope oil and the balance of payments benefits that will accompany it, or (2) knuckling under to the economic coercion which the Bureau proposes and agreeing to refile at the lower rate. This procedure would be tantamount to the Commission's prescription of a rate without the requisite full hearing. The Commission would thereby be doing by indirection that which it is plainly forbidden from doing directly, a result which the *Moss* case clearly proscribes.

D. The Commission Lacks Statutory Authority to Impose a Condition for Possible Refunds.

The Bureau urges (Protest at 33-36) that any order permitting interim rates should include a condition providing for possible refunds. Such a condition is beyond the authority of the Commission.[17]

The relevant portion of Section 15(7) is as follows:

> . . . [I]n case of a proposed *increased* rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were

17. The Bureau tacitly concedes some doubts on this issue when it states that "the Commission's jurisdiction to order a refund of an initial rate is not clear in the statute." Bureau Protest at 33. Contrary to the Bureau's statement, we submit that the law *is* clear; the Commission's refund power does not extend to initial rates.

> paid, such portion of such increased rates or charges as by its decision shall be found not justified. [Emphasis added.]

By its express terms, the refund authority applies only to "a proposed increased rate or charge," not to an initial rate. This fact was reflected in the statement issued by the ICC's Office of Proceedings on April 18, 1977. That statement, which summarized the procedures to be followed in connection with initial tariffs for TAPS, made no reference to the refund provisions of Section 15(7), but instead observed that any person injured by unlawful rates could seek reparations or damages under Sections 8, 9, 13 and 16 of the Act.

Reference to the analogous provision in Section 204 of the Communications Act of 1934, 47 U.S.C. § 204, as amended, is also instructive. Like the Interstate Commerce Act, the Communications Act as originally enacted provided for a refund "in case of a proposed increased charge."[18] In 1976, Section 204 was amended to make the refund provision applicable "in case of a proposed charge *for a new service* or an increased charge" (emphasis added).[19] The legislative history of the amendment makes clear that in the view of the Congress, the earlier language, which mirrors that of Section 15(7) of the Interstate Commerce Act, was applicable only in rate increase situations, and that the change was made to extend the power of the Commission specifically to tariffs involving charges for a new service.[20] The Interstate Commerce Act was amended

18. Act of June 19, 1934, c. 652, Title II, § 204, 48 Stat. 1071.

19. Act of Aug. 4, 1976, Pub. L. 94-376, § 2, 90 Stat. 1080.

20. H. Rep. No. 94-1315, 94th Cong., 2d Sess. (1976), pp. 4-6, 15-16, 3 U.S. Cong. & Adm. News (1976), pp. 1929-30, 1936-37.

extensively the same year,[21] but the comparable refund provision was not similarly broadened.

The Bureau seeks to bootstrap its way to refund authority by contending that a refund condition is "tantamount to the exercise of express statutory authority to grant reparation." (Protest at 34). It suffices to point out that refunds and reparations are separate remedies, involving different statutory bases and different procedures, and the existence of one is not relevant to the existence of the other.

The cases cited by the Bureau are not pertinent. The *Chesapeake & Ohio* case referred to on page 34 did not involve refunds in any way. The procedure utilized in the *Admiral-Merchants Motor Freight* case was upheld by the district court in the peculiar circumstances of that case, under the doctrines of equitable estoppel and "binding waiver" of the right to object, and where the posture of the carriers was regarded as "grossly inequitable." But the court added that the Commission's imposition of a refund condition in a situation where refunds were not expressly authorized by statute is a procedure which "we do not commend . . . as one which *should be or could be* practiced." 321 F. Supp. 353, 360 (D. Colo.), *aff'd*, 404 U.S. 802 (1971) (emphasis added). A conditional order aimed at forcing the carriers to agree "voluntarily" to a refund procedure is not a cure for the Commission's absence of statutory authority.

F. The Request for Documentary Discovery as a Condition to a Tariff Filing Is Contrary to the Commission's Regulations.

The Bureau would impose yet another unlawful condition on respondents by requiring that in addition to filing a

21. Railroad Regulatory Reform Act of 1976, Act of Feb. 5, 1976, Pub. L. 94-210, Title II, § 202(e)(1), 90 Stat. 31, 36.

suggested interim rate they agree to comply with an extensive documentary demand. Bureau Protest at 8-11. By so requesting, the Bureau seeks to free itself from complying with the rules governing practice before the ICC.

Rule 66 of the current Commission Rules of Practice, 49 C.F.R. § 1100.66, provides that:

> Upon petition by any party and upon good cause shown, the Commission may issue an order and direct any party . . . to produce and permit the petitioning party to inspect any designated documents . . . which constitute or contain matters within the scope of § 1100.57 . . . .

Rule 57(a) in turn limits the availability of discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding." 49 C.F.R. § 1100.57(a). This framework thus requires a party seeking documentary discovery in an investigation of tariffs to petition the Commission and to demonstrate the relevance of the materials sought.[22]

The Bureau's proposal, however, would avoid this regulatory scheme and would have massive, poorly-conceived and exceptionally burdensome discovery ordered, with no showing of need or relevance. The Bureau, moreover, would force the carriers to forego their objections to that request, however legitimate, and effectively to become parties to that discovery request by requiring their advance consent to the demand as a condition to filing for interim rates. The Bureau cites no authority for this steamroller approach to deny parties their proper discovery procedures, and none exists.

22. The revised rules scheduled to take effect July 1, 1977, 42 Fed. Reg. 23806 (May 11, 1977), do not alter this procedure. See new rules 55 and 64, 42 Fed. Reg. at 23815, 23817-18.

While ARCO Pipe Line will not here respond in detail to the merits of the discovery request,[23] or to the Bureau's allegations, it is appropriate to note that the document demand contained in Appendix D to the Bureau Protest casts serious doubt on the Bureau's independent discovery needs. That request is a virtual reproduction of a document demand served upon the carriers by the Alaska Pipeline Commission on April 8, 1977.[24] This reliance on the discovery request of another party in another proceeding directly points out the wisdom of requiring the Bureau to establish its need for and entitlement to the documents.

Simply stated, the Bureau should be held to the requirements of the Commission's discovery rules. Those rules dictate that the party seeking discovery show that the documents sought are relevant to the proceeding and are otherwise discoverable, and that such party has a legitimate need

23. It should be noted, however, that the request is extraordinarily burdensome and unreasonable. The request makes no attempt at particularity; instead, its specifications seek "all documents relating or referring to" various general subjects, or "all documents in the nature of" various categories of materials. Many of the subjects or categories are so general that it may be impossible to determine which documents are responsive. For example, specification 19 seeks:

> To the extent not specified above, all documents prepared by or on behalf of the Company, or received by the Company, that relate or refer to cost forecasts, projections, estimates, or expenditures incurred with regard to the costs associated with TAPS.

In order to comply with the document request, the carriers would have to search thousands of files in numerous locations to attempt to identify responsive documents. On top of this, the Bureau requests that production be made within 30 days. If compliance with the proposed request is possible at all, it is certainly not possible within 30 days.

24. *See* Appendix G to this Response. The owner companies objected, *inter alia,* to the scope and return dates of the subpoenas. Negotiations with respect to these matters are continuing.

for the documents in connection with its participation in the proceeding. The proper means for making that showing is through a discovery petition, and not as a condition to a tariff filing.

In *Pacific Molasses Co.* v. *FTC*, 356 F.2d 386, 389-90 (5th Cir. 1966), the court stated:

> When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed . . . . For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules. [Citations omitted.]

That rule applies perforce to an entity of an administrative agency. The Bureau's approach seeks to circumvent the Commission's discovery rules. If adopted, it would also effectively preclude impartial supervision of the discovery process by the Commissioner or Administrative Law Judge designated to preside over any investigation which may be ordered. It should be flatly rejected.

While ARCO Pipe Line strongly resents the unlawful coercive approach urged by the Bureau, it wishes to assure the Commission of its willingness to cooperate in furnishing documentary and other information within the scope of any investigation which may be ordered, utilizing voluntary means rather than compulsory process to the maximum extent possible. Alyeska has, since late 1976, been devoting intensive efforts to cooperating with the Commission and its accounting consultant, on a wholly voluntary basis. The result has been the production of more than 130,000 pages of documents in either hard copy or microform and the holding of 74 interviews of Alyeska personnel. Another

130,000 document pages have been made available to Touche Ross, and recently, Touche Ross, acting on behalf of the Commission, has been conducting an average of 25 interviews a week. As these activities indicate, the carriers are willing and anxious to make available all of the relevant facts dealing with the construction of the pipeline. This willingness to cooperate should not be confused with condoning a circumvention by the Commission of the rules designed to assure fair and orderly discovery.

II. The Proposed Initial Tariffs Should be Allowed to Go Into Effect.

The preceding arguments are addressed to the question of whether the Commission has the *power* to grant the relief requested by protestants. But even assuming *arguendo* that such power exists, there are important reasons why the Commission should not exercise that power in this situation.

A. The Rights of All Parties Can Be Adequately Protected Only By Permitting the Tariffs to Become Effective.

In essence, there are only two courses of action being urged upon the Commission. The protestants argue that the Commission should suspend the proposed rates and force the carriers to adopt lower rates. The carriers contend that the proposed rates should be permitted to go into effect, subject to the Commission's right to require adjustment of those rates if it later determines, after full hearing, that the rates are unreasonable.

The first alternative—that advanced by protestants—could result in irreparable harm to the carriers. Where a carrier fails to realize adequate revenues during a period,

whether such failure results from economic circumstances, a suspension of rates, or a forced reduction of rates to an unreasonably low level, it is well established that the carrier cannot recoup the losses or lost profits, either through a surcharge to customers who have used its services under the tariff, or through future rates which are higher than those otherwise justified.[25]

"It is, of course, a cardinal principle of ratemaking that a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle."[26] Likewise, under none of the provisions of the Interstate Commerce Act ". . . has it ever been the rule that increased rates allowed after a period of suspension could be made retroactive during that period. . . . [S]ubsequent orders allowing increased rates are given only prospective operation."[27]

On the other hand, if the Commission allows ARCO Pipe Line's proposed rates to go into effect, shippers will be protected by the reparation provisions of Section 8 of the Interstate Commerce Act.[28] The reparation provision establishes the liability of the carrier, with respect to any violations of the Interstate Commerce Act, "to the person or persons injured thereby for the full amount of damages

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25. *See, e.g.*, Galveston Electric Co. *v.* City of Galveston, 258 U.S. 388, 395 (1922); FPC *v.* Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942); Communications Satellite Corp., 57 F.C.C. 2d 571, 575 (1976); AT&T *v.* FCC, 487 F.2d 865 (2d Cir. 1973); Prendergast *v.* New York Telephone Co., 262 U.S. 43 (1923); Arizona Grocery Co. *v.* Atchison, T. & S.F. Ry. Co., 284 U.S. 370, 387-88 (1932).

26. Nader *v.* FCC, 520 F.2d 182, 202 (1975). *See also,* United States *v.* SCRAP, 412 U.S. 669, 696 (1973).

27. Hope Natural Gas Co. *v.* FPC, 196 F.2d 803, 807 (4th Cir. 1952).

28. 49 U.S.C. § 8.

sustained in consequence of any such violation." That provision applies even though there is no refund power with respect to initial rates.[29] Pursuant to Section 9 of the Act, 49 U.S.C. § 9, any person claiming damage may elect between filing a complaint before the Commission and filing a complaint in a United States district court. If any complaint is made to the Commission pursuant to Section 13 of the Act, Section 16 then directs the Commission to determine entitlement to damages and to direct the carrier to pay any damages assessed, the Commission's order thereafter being subject to enforcement in either a United States district court or a state court.[30]

Under the Act, the Commission has the power to award reparations to shippers injured by unreasonable charges.[31] The question of the reasonableness of a rate is a matter within the primary jurisdiction of the Commission,[32] and it is well settled that the power and duty over rate-making is vested in the Commission alone. Thus, the court will not substitute its judgment for that of the Commission where

29. *See* Section I.D., *supra*.

30. To the extent damages are to include interest, Section 202(e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, provides a useful guide to the setting of an appropriate interest rate. That Act specifies that if the Commission shall order refunds for what it finds to be an unlawful increased rate, interest shall be computed "at a rate which is equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days." 49 U.S.C. § 15(8)(e). This provision constitutes the most recent congressional statement on this subject in the context of the Interstate Commerce Act. The Bureau's request for a 9% interest rate, Bureau Protest at 36, and ASRC's alternative interest formulations, ASRC Protest at 19, are based on no authority whatsoever and should be disregarded.

31. Nader *v.* FCC, *supra*, 520 F.2d at 203 n.22.

32. United States *v.* ICC, 337 U.S. 426, 437 (1949).

the Commission's judgment is based on substantial evidence taken in due course.[33]

Of course, the only protestants asserting an economic stake in the level of ARCO Pipe Line's tariff are the State of Alaska and ASRC. ASRC's stake is derivative of the State of Alaska's royalty interest, since payments to the fund in which ASRC is entitled to share come from a portion of the State's one-eighth royalty interest in all North Slope oil produced. In essence, ASRC's concern is merely in the timing of payments, and not their total amount, since a ceiling on the fund is set by the Alaska Native Claims Settlement Act. *See* ASRC Protest at 6. Since only a matter of timing is involved, ASRC's concern with maximizing its monetary stake can be met by the expeditious disposition by the Commission of any investigation it may choose to order. Similarly, ASRC's asserted interest in possible future leases of its lands or sale of oil that may be found thereon can also be protected by such disposition.

With respect to the State, it might be well to note at the outset that Alaska does not seek outright suspension, for reasons which are fully understandable. As Appendix A to this Response indicates, Alaska stands to gain enormous tax revenues from the production and transportation of North Slope oil. During the period from September 1, 1977 through December 31, 1981, ARCO Pipe Line alone expects to pay out more than $260 million in Alaska Gross Receipts, *ad valorem* and income taxes. Assuming a proportionate level of payments by other carriers, these taxes upon the carriers alone would amount to approximately $1.3 billion during this period. In addition, Alaska has a significant severance tax upon oil produced, a tax which

33. City of Danville *v.* Chesapeake & Ohio Ry., 34 F. Supp. 620, 625 (W.D. Va. 1940).

was recently increased by approximately 50 percent to a rate of 12.25 percent. Thus, while the State claims to be suffering significant economic injury, it has unilaterally increased its severance tax take in an amount which, at an assumed wellhead value of $6.55 a barrel,[34] would produce an additional $93 million a year in revenue at a production rate of 1.2 million barrels a day. It is therefore apparent that the State's interests would be severely injured if TAPS did not go into operation as scheduled.

Finally, the state has a one-eighth royalty interest in all oil produced; at a production rate of 1.2 million barrels a day and an assumed wellhead value of $6.55 (see note 34, *supra* at 31), this amounts to more than $350 million annually.

The State's interests in the level of tariffs has several aspects. First, it may be a shipper of oil which it takes in kind pursuant to its royalty rights. Any damage to its interests as a shipper can clearly be remedied by a reparations proceeding pursuant to Sections 8 and 9 of the Interstate Commerce Act.

Second, the State has an interest as the seller of oil taken in kind. It can protect that interest in at least two ways: (1) by selling its oil at Valdez, so that it is the shipper entitled to any reparations which may be awarded, or (2) by including in its contracts for sale of oil at the wellhead a provision entitling it to recapture the amount of

34. The starting point for this figure is $13.50, the landed price at Los Angeles for imported sour crude as adjusted downward for a quality differential. This is the figure that the FEA has most recently indicated it intends to set as a West Coast market price for Alaska North Slope oil. Subtracting from that figure $.70 for tanker transportation between Valdez and the West Coast, $.05 for contributions to the TAPS System Liability Fund, and $6.20 for the average TAPS transportation tariff, an estimated wellhead value of $6.55 results. ASRC's assumption that the wellhead value will be in the range of $4.25, ASRC Protest at 17, is simply wide of the mark.

any reparations to which the purchaser becomes entitled if the transportation rate is ultimately reduced.

Third, the State has an interest in the amount of severance tax which it receives, and that tax is related to the wellhead value of the oil, which in turn is affected by the amount of the pipeline tariffs. It would appear that the State's remedy with respect to its severance tax interest lies with the enforcement of provisions of state law respecting the collection of the tax. The Alaska Department of Revenue has powers with respect to challenging the value assigned to produced oil (see Alaska Stat. § 43.55.050 (1971)). A period of three years is available to the Department if it wishes to initiate assessment proceedings relating to the severance tax. Alaska Stat. § 43.05.260 (Supp. 1976).

In short, it appears that the State's interest as royalty holder benefits from substantial protection afforded by the reparations procedure, assuming that it takes prudent steps to bring itself within those protections. The State's severance tax interests appear to be adequately protected under state law, provided that this Commission expeditiously concludes any investigation which it may order and any related reparations proceeding. ARCO Pipe Line, on the other hand, for the reasons set forth above, is wholly unprotected if its tariff is initially understated. In these circumstances, equity clearly favors allowing the tariff to become effective as scheduled.

B. The Challenges to the Rate in ARCO Pipe Line's Tariff Cannot Properly Be Resolved in a Suspension Proceeding.

Apart from the urging of unlawful procedures upon the Commission, the major defect in the approach advanced by all protestants is the suggestion that the Commission reject ARCO Pipe Line's tariff, derived in accordance with

longstanding ICC valuation and rate-of-return methodology, and substitute in its stead a wholly new approach which has not been subjected to scrutiny by the Commission or its staff and which has major and obvious conceptual flaws. This course of action should be rejected for a number of reasons. First, the ARCO Pipe Line tariff has been derived strictly in accordance with existing ICC methodology; protestants are incorrect in asserting that such methodology does not allow the deduction of interest as an expense, since the ICC has as recently as 1976 furnished the Congress with detailed rate-of-return-on-valuation statistics which demonstrate beyond a possible doubt that the statistics were based on the deduction of interest as an expense (*see* pages 35-39, *infra*). Second, the very methodological issues involved are the subject of a major rulemaking proceeding, Ex Parte No. 308, and the Commission has itself recently said that even a full-blown tariff investigation proceeding is not a suitable forum for examining proposed new methodology when that proceeding relates to individual tariff rates; it is clear that the issues raised by protestants cannot receive meaningful consideration, much less resolution, in a summary proceeding in which the sole question is whether or not to suspend (*see* pages 39-43, *infra*). Third, even if one were to accept the basic methodological assumptions of protestants, they have applied their methodology in a demonstrably unsound way in an effort to distort the true rate of return earned under their methods; rather than producing rates of return in the range of 56 percent to 100 percent as claimed by protestants, any proper application of their methodology would produce a rate of return for ARCO Pipe Line on the order

of 13.5 percent, well within accepted observed ranges for rate of return (*see* pages 44-51, *infra*).

1. ARCO Pipe Line's Tariff Is Established in Accordance With Existing ICC Methodology.

Appendix A to this Response describes in detail the procedures used in computing the rate of $6.04 per barrel set forth in the ARCO Pipe Line tariff. A comparison of Appendix A with the Verified Statement of Jesse C. Oak, Senior Valuation Engineer, of the ICC Bureau of Accounts, submitted in Ex Parte No. 308 for the express purpose of describing ICC pipeline valuation methodology, will demonstrate that ARCO Pipe Line's tariff is constructed in accordance with existing ICC valuation methodology.

We do not understand any protestant to contend that the situation is otherwise. With respect to application of existing methodology, the sole issue raised by the Bureau and the State of Alaska is that treating interest as an expense in calculating allowable rate of return on valuation is contrary to ICC practice. Their contentions are erroneous; in treating interest as an expense, ARCO Pipe Line has followed a course well-understood and long accepted by the ICC.

The most celebrated Supreme Court case involving rates of return for oil pipelines is *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959). The parties to that case were 13 oil companies and pipeline companies. They included affiliates or predecessors in interest of five of the respondents or their corporate parents. The case was a major attack upon the method used by the companies to determine the dividends which a pipeline subsidiary could lawfully pay to a corporate parent which was a shipper on

the pipeline, under the terms of the so-called Pipeline Consent Decree.[35]

The Pipeline Consent Decree had made ICC valuation a central factor in calculating the allowable rate of dividends. The process for measuring allowable dividends under the consent decree, subject to the seven percent ceiling imposed by the decree, was therefore substantially the same as that for measuring allowable return on valuation under the eight percent limitation imposed upon crude oil pipelines by roughly contemporaneous ICC cases.[36]

The *Atlantic Refining* case is significant because of the interpretations placed upon it by the ICC. The ICC has obviously been aware that pipelines are frequently financed with a high percentage of debt appearing on the books of the pipeline subsidiary. If ICC methodology did not treat interest as an expense, then the ICC-imposed eight percent return limitation would have been a much more severe limitation than the seven percent dividend-payment limitation imposed by the consent decree, and the consent decree would have been largely irrelevant for any pipeline financed with a high debt-equity ratio. Yet testifying before a congressional committee in 1972, then-Commission Chairman Stafford and several ICC staff personnel directly involved in the regulation of pipelines emphasized the effectiveness of the consent decree in controlling the returns to pipeline

35. United States *v.* Atlantic Refining Co., Civil Action No. 14060 (D.D.C., December 23, 1941). In view of the Pipeline Consent Decree, and United States *v.* Atlantic Refining Co., *supra* at 35, the propriety of the Antitrust Division relitigating, in effect, before the ICC the battle which it lost in the Supreme Court in 1959 appears doubtful. This question obviously cannot be addressed in the summary proceeding.

36. Minnelusa Oil Corp. *v.* Continental Pipeline Co., 258 I.C.C. 41, 54 (1944); Reduced Pipe Line Rates and Gathering Charges, 243 I.C.C. 115, 143 (1940).

companies.[37] Their entire testimony was premised on the direct comparability between the dividend rate allowable under the consent decree and the rate of return on valuation allowed for ICC purposes. Hence this testimony clearly demonstrates that the ICC considered interest as an element of expense in applying ICC rate-of-return limitations.

Subsequent ICC submissions to the Congress have rested on similar assumptions concerning interest as an allowable expense. On November 10, 1975, Chairman Stafford furnished information to a subcommittee of the House Small Business Committee in response to pointed questions on pipeline rates of return. Included in the response to the Subcommittee's Question 5 were detailed summary tables captioned "Oil Pipeline Companies—Rates of Return on Valuation." Those tables are included in Appendix B.

In March of 1976, Chairman Stafford discovered that some errors had been made in the 1975 submission, and furnished the congressional committee chairman, Mr. Hungate, with corrected versions of certain of the tables. A copy of his transmittal letter and the corrected tables are also included in Appendix B.

In order to determine definitively the basis for the rate of return calculations used by Chairman Stafford in the 1976 figures furnished to Congress, Mr. John Jeter, a partner in the independent accounting firm of Arthur Andersen & Co., had calculations made under his supervision, based on the Form P Annual Reports to the ICC, for a number of pipeline companies. A detailed description of the calculations

37. Anticompetitive Impact of Oil Company Ownership of Petroleum Products Pipelines: Hearings Before the Subcommittee on Special Small Business Problems of the House Select Committee on Small Business, 92nd Cong., 2d Sess., at 77, 84-89, 94-95 (1972).

is found in Mr. Jeter's verified statement regarding the treatment of interest as an operating expense, Appendix C.

Mr. Jeter's conclusion is both significant and dispositive on the question of interest being allowed as an expense in calculating rate of return on valuation under existing ICC methodology: *He found that in every instance with respect to the companies whose Form P's were examined, the data furnished to Chairman Hungate by Chairman Stafford was based on allowance of interest as a deduction in calculating the rate of return on valuation figure.*

These calculations of rate of return on valuation by the ICC are the strongest possible indication as to current ICC methodology with respect to the deduction of interest. They are certainly much more current, and more authoritative than the 1935 figures on which the Bureau relies to support its contention that interest is not deductible as an expense in determining rate of return on valuation.[38]

Based on the consistent history of interpretation of its own methodology by the ICC, ARCO Pipe Line's treatment of interest as an expense constitutes application of accepted ICC methodology. Protestants' contrary suggestion is simply wrong.

2. Changes In Methodology Are Not Appropriate In this Suspension Proceeding.

The rates proposed by protestants are based upon changes in the existing ICC valuation and rate of return methodology. Such changes can only be dealt with in a rule-making proceeding, carried out pursuant to the Administrative Procedure Act, in which all interested parties have an opportunity to present their views and any information they deem relevant. It is inappropriate to consider those

38. Bureau Protest at 28-29.

changes in any proceeding involving the tariffs of individual carriers.[39] It is singularly inappropriate to do so in the context of a suspension proceeding, where no evidence is presented, where the parties and the Commission are operating under a restricted time schedule, and where the sole focus is, or at least should be, on whether or not to suspend.

Moreover, there is currently pending a rule-making proceeding which encompasses most, if not all, of the methodological issues raised by protestants. That proceeding, Ex Parte No. 308, *Valuation of Common Carrier Pipe Lines,* was initiated by the Commision in 1974 to examine the Commission's methodology for determining valuation for pipelines. It was later expanded in scope, for the purpose of reconsidering the authorized rate of return. Despite protestants' suggestions to the contrary, Ex Parte No. 308 is actively progressing. Indeed, within the last two months, lengthy statements of position and data have been filed by numerous parties, including the Department of Justice, representatives of the ICC Bureau of Investigations and Enforcement, the State of Alaska, the Association of Oil Pipe Lines, the Midcontinent Petroleum Prod-

39. Tracing the requests of the protestants through to their logical conclusion points up the impropriety of their approach. Assuming *arguendo* that protestants were to prevail and the Commission were to alter its methodology in determining TAPS valuation and allowable rate of return, one of two courses of action would be possible. If the changes were made applicable only to TAPS owners, the Commission would be treating them differently than other carriers, in violation of the Interstate Commerce Act and the Fifth Amendment of the U.S. Constitution. But if the Commission were to attempt to extend the changes to other carriers, those carriers could complain that they were deprived of any opportunity to participate in the process which produced the changes, in violation of the Commission's rules and the Administrative Procedure Act. Either way, the result is untenable. Clearly a general rule-making proceeding is the only appropriate vehicle for considering methodological changes.

ucts Shippers (a complainant/protestant in *Williams Brothers, infra*), the Williams Pipe Line Company (the successor to the Williams Brothers Pipe Line Company), and other shippers and pipeline companies. A hearing has been scheduled for August 16, 1977 for the purpose of cross-examining witnesses.

The methodological issues raised by protestants are within the scope of Ex Parte No. 308 and should be pursued there. The impropriety of pursuing such issues in proceedings involving individual pipelines has been recognized by the Commission in *Petroleum Products, Williams Brothers Pipe Line Company ("Williams Brothers")*, Docket No. 35533 (Dec. 3, 1976).[40] In that case, the protestants/complainants[41] unsuccessfully presented a number of methodological issues, including several of the ones raised by protestants here. They attacked the use of valuation as a rate base, opposed the inclusion of certain property in the valuation rate base, urged modification of the weight given certain costs in the valuation formula, and asked the Commission to lower the rate of return guidelines for petroleum pipelines.

The presiding judge found the proposed increased rates just and reasonable and the proposed initial joint rates not unlawful (Initial Decision, June 19, 1974). In so doing, he wrote:

> . . . The matter of defects in the Commission's valuation process raised by the Shipper Group has no place here. The valuation process pursuant to section 19a has been employed by the Commission for many years and on railroad and pipeline valuations has withstood many challenges. Any questions involving the valuation process should be determined in a rule-making proceeding at which all affected persons are allowed to present their views. [At 18.]

40. *See also* American Commercial Lines, Inc. *v.* Louisville & N.R.R., 392 U.S. 571 (1968). There the Court endorsed the ICC's decision to deal with complex costing issues in an ongoing rulemaking proceeding rather than in a narrowly focused action concerned with the specific rate reduction of a group of railroads. The Court described the rulemaking proceeding as "a more suitable context" for resolving broad-scale issues. 392 U.S. at 592.

Upon exceptions of various shippers, the ultimate conclusions of the Administrative Law Judge were adopted by Division 2 (351 I.C.C. 102, November 5, 1975). In commenting upon the shippers' exceptions regarding valuation methodology, Division 2 noted:

> In Ex Parte No. 308, the Commission will address itself to each of the seven elements it considers in the development of a valuation. These are (1) original cost, (2) cost of reproduction new, (3) cost of reproduction new less depreciation, (4) going concern value, (5) present value of land, (6) present value of rights-of-way, and (7) working capital. Since the Commission applies the same procedures equally to all pipeline carriers under its jurisdiction, there is no reason to single out one carrier and apply different procedures. If the Commission should elect to change its methodology of performing valuations in Ex Parte No. 308, the new methodology will be applied to all carriers equally and on the same basis. [351 I.C.C. at 112.]

41. Docket No. 35533 was a proceeding consolidating (1) several protests to increased rates that resulted in investigation but not suspension, (2) a complaint against those rates, and (3) a fourth-section application by the shippers regarding certain of those rates.

On reconsideration, the Commission essentially affirmed the ultimate conclusions reached by Division 2 and the presiding judge and stated:

> . . . Questions have been raised in this proceeding both as to whether the carrier's valuation is the proper rate base, and as to what rate of return should be permitted.
>
> • • •
>
> We conclude that the Commission's valuation of WBPL's properties is the proper rate base to be employed in this proceeding. . . . Considerations of consistency and fairness require that we adhere to our previously recognized criteria in investigating the rates of particular pipelines at the present time.
>
> • • •
>
> The technique employed by the Commission in making its valuations was discussed in the Division's report. As the Division found, this is not the proceeding for considering a change in the valuation methods. Such questions will be dealt with in the pending rulemaking proceeding in Ex Parte No. 308, *Valuation of Common Carrier Pipelines.* [At 6-18.][42]

The approach taken by the Commission in the *Williams Brothers* case is plainly correct. The same approach should be taken here.

3. Protestants' Rate of Return Assumptions Reflect Wholly Incorrect Economic Principles.

As the discussion above indicates, it is the position of ARCO Pipe Line that deviations from accepted ICC

42. The Commission's decision in Docket No. 35533 is currently on appeal in the United States Court of Appeals for the District of Columbia Circuit *sub nom. Farmers' Union Central Exch., et al.* v. *ICC,* No. 76-2138.

methodology cannot as a matter of law and should not as a matter of policy be undertaken in the context of a summary suspension proceeding of this kind. Protestants, however, have urged just such an improper course of action, and have accompanied their contentions with a variety of calculations which purport to show that the carriers, including ARCO Pipe Line, would derive exorbitant rates of return if the tariffs as filed were allowed to go into effect. The Bureau, for example, calculates that, for pipeline companies with a debt/equity ratio of 93%/7%, the effective rate of return on equity at seven percent of valuation would be 100 percent.[43] The Antitrust Division asserts that, at a debt/equity ratio of 90%/10%, the ARCO Pipe Line tariff would produce a rate of return of 58.6 percent.[44] The State of Alaska's "expert" witness, in a statement attached to the State's protest, calculates ARCO Pipe Line's "profit rate on equity" to be 66 percent.[45]

These statements are irresponsible and obviously designed to persuade the Commission that some outrageous return is to be realized by the TAPS owner companies. Protestants apparently hope that the Commission, faced with the demanding time constraints of the suspension proceeding schedule and with little opportunity to evaluate the soundness of the calculations which are being advanced, can be stampeded into effectively prescribing an unjustly low rate for the transportation of oil through TAPS.

Even recognizing the advocate's role of the State of Alaska, ARCO Pipe Line is disappointed that the State would utilize profit rate figures so deliberately misleading and calculated to prejudice the Commission in its deliberations. However, it is even more disappointing to find two

43. Bureau Protest at 32.
44. Antitrust Division Protest at 4.
45. Ileo Statement at 1.

agencies of the Federal Government, the Antitrust Division and the Bureau, whose economic interests are not at stake, engaging in a similar use of misleading rate of return data. While the individuals responsible for preparing the protests of the Division and the Bureau may not be versed in the principles of rate of return calculation, both agencies have access to expert economic advice, which they apparently have not utilized.

The central theoretical underpinning of the Bureau, Antitrust Division and State of Alaska calculations of rate of return is the concept that return should be limited to actual costs with respect to the debt portion of ARCO Pipe Line, and a positive rate of return should be allowed only on the equity portion. This is contrary to established ICC methodology, and of course such a major alteration in methodology should not be undertaken in a summary suspension proceeding. But, putting aside for the sake of argument the inappropriateness of making such an alteration at this time, there is a monumental defect in protestants' application of their own theory, rendering all of their rate of return calculations wholly meaningless: What all of the protestants' rate of return calculations either overlook or deliberately fail to mention is that in order to finance the debt which is carried on the books of ARCO Pipe Line, it was necessary for the parent company, Atlantic Richfield Company, to guarantee *every penny* of the debt incurred by ARCO Pipe Line in connection with construction of TAPS. It is true that ARCO Pipe Line has a very high debt/equity ratio. But it is also true that *such a ratio could never be sustained by ARCO Pipe Line as a separate enterprise whose creditors looked solely to the assets of the pipeline company for satisfaction of their claims.* In such circumstances, it is wholly specious to

make rate of return calculations based on the capital structure of the pipeline company alone; the entire enterprise is made possible by the capital structure and credit of the parent company which are pledged in satisfaction of the ARCO Pipe Line debt.

In short, projects such as TAPS are possible only because the parent companies lend their credit to pipeline subsidiaries. Absent such credit, no investor in his right mind would have purchased the notes or bonds of ARCO Pipe Line at the interest rates at which they were offered. Indeed, it is doubtful that they could have been sold at any interest rate.

The fact that, in situations such as are presented here, the relevant capital structure for rate of return calculations is that of the consolidated enterprise, not that of the pipeline subsidiary, is attested to by the verified statements of an experienced investment banker, Mr. Robert L. Huston, a Senior Vice President of White, Weld & Co., Inc., Appendix D. It is further supported by the verified statement of Dr. J. Rhoads Foster, who has 40 years' experience in rate of return methodology, Appendix E. Both Mr. Huston[46] and Dr. Foster[47] make it quite clear that it is absurd to base rate of return calculations on the capital structure of a company such as ARCO Pipe Line, under the circumstances present in the case of TAPS, where Atlantic Richfield Company has guaranteed all of the debt. They express the view that the relevant capital structure is that of the consolidated enterprise.

The only expert opinion adduced in support of any protestant's rate of return calculations is that of Dr. Ileo, in support of the State of Alaska protest. Yet in another context, appearing recently as an expert witness for the

46. Appendix D at 3-5.
47. Appendix E at 6-7.

staff of the Alaska Pipeline Commission, Dr. Ileo expressed views in total accord with those of Dr. Foster and Mr. Huston. Dr. Ileo was testifying as a consultant in a proceeding concerning a proposed intrastate tariff filed by Nikiski Alaska Pipeline Company ("Nikiski"), a wholly-owned subsidiary of Tesoro Petroleum Corporation ("Tesoro").[48] Like many pipeline subsidiaries, Nikiski has a considerably higher debt/equity ratio than its parent. In his testimony before the APC, Dr. Ileo discussed the debt/equity issue as follows:

> [I]t would be incorrect in my judgment to treat Nikiski as if it were an independent company as long as it is wholly owned by Tesoro. This is the case because all of the capital of Nikiski is raised by Tesoro. Moreover, despite the fact that Nikiski appears to be nearly 100% debt financed by Tesoro, it is truly financed by the consolidated capital structure of Tesoro just as any wholly owned operating subsidiary of Tesoro. The fact that Nikiski would never have been constructed without the financial backing of Tesoro, as reflected in the testimony of Nikiski, clearly reflects this situation.[49]

In short, the only expert witness who has provided a statement in support of any protestant's efforts to bring about a change in ICC methodology has given testimony, a mere three months ago, appearing as a witness for an agency of the State of Alaska, which wholly undercuts his own rate of return calculations in support of the Alaska protest. Of course, his earlier testimony also destroys the

48. Alaska Pipeline Commission, Docket Nos. p-76-3 and p-77-3.

49. Testimony of Michael J. Ileo in Alaska Pipeline Commission Docket Nos. p-76-3 and p-77-3, March 14, 1977, at 61-63.

basis of the calculations used by the Bureau and the Antitrust Division as well.

ARCO Pipe Line reiterates the view that this is not the proper proceeding to be considering these areas of rate of return theory. As Dr. Foster indicates in his statement, such matters deserve careful scrutiny in a comprehensive and adequate proceeding.[50] However, because protestants have charged ARCO Pipe Line with earning highly excessive rates of return, the company has asked the independent accounting firm of Arthur Andersen & Co. to calculate rates of return in a manner generally consistent with the views expressed by Dr. Foster and Mr. Huston, utilizing the capital structure of Atlantic Richfield and its subsidiaries on a consolidated basis, and assuming the same tariff rate ($6.04 per barrel) reflected in the pending ARCO Pipe Line tariff.

As is outlined in the verified statement of John A. Jeter regarding return on equity, Appendix F, Mr. Jeter first applied Atlantic Richfield's percentage of debt, 36.4%, to the book value of ARCO Pipe Line's investment in TAPS. The resulting debt figure was then subtracted from estimated ICC valuation to obtain an equity figure. Using the resulting equity figure, and also using the anticipated revenues available for interest, income taxes, and net income, a rate of return was calculated based on the proposed $6.04 rate. As is set forth in Appendix F, the resulting rate of return on equity for 1978, the first full year of operation, is 12.2%; and for the period from September 1, 1977, to December 31, 1981 (the averaging period used in deriving the $6.04 tariff), is a weighted average of 13.4%.

To facilitate comparisons, Mr. Jeter also computed rates of return on equity in the same manner, but using book value rather than ICC valuation to obtain equity figures.

50. Appendix E at 5.

As is set forth in Appendix F, these computations show a return on book equity in 1978 of 13.1%; and for the period September 1, 1978, to December 31, 1981, a weighted average return on book equity of 15.2%.

These figures are, of course, a far cry from the rate of return figures which the protestants would have the Commission believe are to be earned on investments in TAPS. It should be clear that the presentations made by the protestants, ignoring as they do the economic realities of the financing arrangements for TAPS, are seriously misleading and prejudicial. It should also be clear that the rates of return on book equity calculated by Mr. Jeter are well within the range of observed rates of return for petroleum and other capital-intensive industries referred to in the statement of Mr. Huston.[51] In the opinion of Mr. Huston, they constitute a modest return considering the risks involved.[52]

ARCO Pipe Line is not contending in this proceeding for these methods, or any other new method of determining allowable rate of return; rather, it contends that the traditional ICC methodology should be applied unless properly modified in a lawful manner in a proceeding such as Ex Parte No. 308. *It wishes the Commission to understand, however, that the rate of return figures advanced by various protestants have absolutely no foundation in economic reality and must be wholly disregarded by the Commission.*

C. The Lenzner Preliminary Statement is Irrelevant to Any Issue Presently Before the Commission.

The voluminous Preliminary Statement of Terry F. Lenzner, which accompanies the State of Alaska's formal

51. Appendix D at 7.
52. Appendix D at 7.

pleading, is the only material submitted by any protestant which addresses specific factual issues. That statement is expressly *not* relied upon by the State of Alaska in its calculations of proposed tariff reductions and thus presents no question for resolution by the Commission in its proceeding today.[53] Its sole pupose would seem to be to portray Alyeska and the carriers in an unfavorable light by using a selective grab-bag of apparently damaging facts and admissions and thereby to drive the Commission to accept Alaska's lower tariff despite the demonstrable weaknesses in its legal and economic arguments. ARCO Pipe Line rejects the conclusions reached in the Lenzner Statement, as well as the technique of adducing as evidence a smattering of documents and testimony taken out of context. It fully intends to rebut the unfounded charges and correct the distorted impressions. However, as Alaska itself all but concedes, the appropriate setting for accomplishing this is the "ultimate investigation."[54]

Unlike a summary suspension proceeding, with its nonexistent discovery and abbreviated schedule, an investigation provides the procedural tools for eliciting relevant evidence and the time to consider that evidence with care. The story which will emerge from the investigative process is that the managers of the TAPS project faced complicated and novel problems. With the benefit of hindsight, it may appear that mistakes were sometimes made. However, if anyone believes that infallibility is the test of prudent management, he misconceives both the nature of business and the state of the law. Moreover, as the material presented in the Lenzner Statement makes clear, respondents were not indifferent, but highly sensitive to efficiency

53. Alaska Protest at 10-11.
54. Alaska Protest at 10.

and cost issues, and sought to unearth problems in these areas, and devise policies to correct them. Indeed, the documentary materials upon which Lenzner relies, selectively drawn as they were largely from the massive files of Alyeska, exist precisely because Alyeska and its owner companies *were* concerned with efficiency and economy. The management actions involved were administratively sound and are legally unassailable.

A full investigation will place the building of the pipeline in its proper context. Contrary to the impressions artfully created in the Lenzner piece, TAPS was not a routine public works project. Rather, it was a unique undertaking of enormous scale which presented a host of novel questions and required, in turn, novel, often "state of the art," solutions. The builders were not only faced with the task of constructing one of the longest, largest diameter pipelines ever conceived, but of doing so through remote, rugged terrain, under adverse climatic conditions at a time when a heightened environmental awareness demanded the imposition of stringent safeguards. They had to cope with a myriad of government agencies with often conflicting regulations. They had to design a system to withstand both earthquakes and tidal waves and utilize technology and materials never employed before. Significant public policy considerations mandated the completion of the project in the shortest possible time: the economic need to reduce our balance of payments deficit and the national security interest in decreasing dependence on imported crude oil and becoming more energy self-sufficient. Against this backdrop, the Trans Alaska Pipe Line was built, and operations were begun in accordance with the schedule.[55]

55. Much of Mr. Lenzner's presentation seems to be a complaint that TAPS owners and Alyeska were pushing to complete the project rapidly. The rapid and timely completion of TAPS, of course,

These factors—and their impact upon the TAPs project—must be part of any assessment on construction performance and cost. A balanced and complete investigation of the building of the pipeline will result in a vindication of Alyeska and the carriers and the approval of the capital expenditures upon which the tariffs are based.

D. The Calculations of ARCO Pipe Line With Respect To Depreciation and Removal Costs Are Proper.

The carriers based their calculations of book depreciation on a 25 year useful life for the pipeline. Three of the protestants, the Bureau, ASRC and the State of Alaska, challenge this assumption, with the Bureau arguing for a 27.5 year period and Alaska and ASRC contending for a period of 35 years.[56]

As indicated in Appendix A, ARCO Pipe Line's use of a 25 year life was based on studies by certain producers showing that production in the Sadlerochit Reservoir would decline by the year 2002 to a level such that continuing operation of the system would be uneconomical. This represents the best judgment of ARCO Pipe Line at this time, and is consistent with the FPC recommendation relied

conferred a considerable benefit upon Alaska, whose substantial tax revenues, derived from both oil production and pipeline operations (*see* pp. 31-32, *supra*), could not begin until TAPS went into operation. In addition, the national interest in early production has been and is apparent. Apart from the reduced reliance on foreign oil, which North Slope production will bring about, the North Slope production will also produce a favorable balance of payments impact in the United States of approximately six billion dollars annually. This is based on production at 1.2 million barrels per day and a representative value of foreign crude delivered in foreign tankers of approximately $13.70 per barrel. Rapid completion also avoided the substantial costs of mobilization and de-mobilization for an additional construction season, and eliminated the impact of further construction cost escalation as a result of inflationary factors.

56. Bureau Protest at 23, Alaska Protest at 51, ASRC Protest at 15.

on by the Bureau, which used a recovery period of 25 to 30 years.[57]

Any conclusion that the useful life should be substantially longer than 25 years must rest on the assumption that oil formations other than the Sadlerochit Reservoir will be developed. The State mentions the Lisburne and Kuparuk Oil Pools as possibilities, as well as Naval Petroleum Reserve Four and the Beaufort and Chukchi Sea areas.[58] Such development may occur, but whether it will is at present a highly speculative matter, depending on such imponderable factors as the results of further drilling, the cost of petroleum from other sources, and future Government regulations which may impact the exploration and production of petroleum. It is rational and prudent for those who are making large investments in transportation facilities to base their plans on reasonably certain sources, not speculative events.

In addition to challenging the depreciation basis, the Bureau and the State of Alaska would also have the Commission disallow part of the expense projected by ARCO Pipe Line in connection with the carriers' obligation to remove the pipeline facilities and restore the surface at the end of the pipeline's service life. The basis for ARCO Pipe Line's calculation of removal costs is explained in detail in Appendix A. The method adopted for dealing with the removal cost properly takes into account inflation over time and the tax treatment of collections relating to the removal obligation.

CONCLUSION

The only means by which both the protestants and the carriers can be treated lawfully and equally is to permit the tariffs here at issue to become effective as scheduled.

57. Bureau Protest at 22.
58. Alaska Protest at 46-47. *See also* ASRC Protest at 15.

Any other approach will be in contravention of the limitations on the Commission's powers to suspend and to order rates, and will subject the carriers to the possibility of unwarranted, but unrecoverable, losses. If the tariffs are permitted to go into effect, and are ultimately found to be unlawful, the protestants can be adequately protected through the mechanisms provided for in the Interstate Commerce Act and elsewhere.

ARCO Pipe Line does not object to an investigation into the lawfulness of the tariffs. It submits, however, that any attempt to engage in rate-making at this time, on the basis of the limited factual record and unsound economic presentations now before the Commission, would virtually guarantee an arbitrary, capricious and incorrect result.

For the foregoing reasons, ARCO Pipe Line Company urges that its tariff be permitted to go into effect as scheduled, subject to a full, but prompt, investigation.

Respectfully submitted

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Dated: June 22, 1977

[Certificate of Service Omitted]

[Caption Omitted]

APPENDICES TO RESPONSE OF ARCO PIPE LINE COMPANY TO PROTESTS AND PETITIONS FOR SUSPENSION AND INVESTIGATION OF ICC TARIFF NO. 1030 ISSUED MAY 31, 1977

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EXHIBIT
IN SUPPORT OF
ARCO PIPE LINE COMPANY
ICC TARIFF NO. 1030
FOR TRANSPORTATION OF PETROLEUM FROM
PRUDHOE BAY, ALASKA TO VALDEZ, ALASKA
IN INTERSTATE COMMERCE

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APPLICATION OF HISTORICAL ICC METHODOLOGY TO ESTABLISH THE INITIAL TARIFF FOR THE TRANS ALASKA PIPELINE SYSTEM PREPARED BY ARCO PIPE LINE COMPANY

INTRODUCTION

This memorandum will document the various data considerations, assumptions and methodologies employed in establishing a tariff rate of $6.04 per barrel over ARCO Pipe Line Company's ("ARCO Pipe Line") undivided interest portion of the Trans Alaska Pipeline System ("TAPS"). The detailed calculations and methodology employed and described herein are believed to be wholly consistent with the historical methodology employed by the Interstate Commerce Commission (ICC) with respect to valuation and allowable rates of return for oil pipeline systems.

ORIGINAL COST DATA

Actual construction expenditures from 1969 through 1976 and estimated 1977 expenditures, were supplied to ARCO Pipe Line and the Commission by Alyeska Pipeline Service Company ("Alyeska"). These expenditures were segregated by year of expenditure by account for accounts 151 through 165, and were the basis for the determination of the original cost data. (See Schedule 8, page 4).

ICC methodology requires that engineering overhead and general and administrative (G&A) overhead be broken out separately from the various accounts. (Testimony of Jesse C. Oak, Senior Valuation Engineer, Bureau of Accounts, Interstate Commerce Commission, submitted in Ex Parte No. 308 on March 25, 1977 ("Oak Statement"), Appendix B thereto, page B-5). Based upon information supplied by

Alyeska, the engineering and G&A overhead amounts were taken out of accounts 153 through 165 and accumulated separately.

The amounts reported in account 162 (Delivery Facilities) include costs which require reclassification to other primary accounts for valuation purposes. An analysis of account 162 by year by type of expenditure was provided by Alyeska. After allocating certain construction overheads included therein among the other expenditures included in Account 162, these expenditure groups were added to the appropriate primary accounts to arrive at "As-Adjusted original cost for accounts 153-162. (See Schedule 8, page 5).

In order to arrive at the total original cost of construction for use in the valuation process, the G&A and engineering overheads previously segregated, along with interest costs capitalized during construction, were added to "As-Adjusted" original cost.

It should be noted that interest and related costs on funds borrowed specifically for this project were capitalized throughout the construction period in accordance with ICC accounting regulations. In order to determine the total interest capitalized to be included in the original cost, an analysis of actual debt cost relating to the project was prepared through March 31, 1977 and the estimated interest to be incurred during the period April 1, 1977, through August 31, 1977 was calculated. This was based on the debt outstanding at March 31, 1977, the debt expected to be incurred between March 31 and August 31, and debt expected to be repaid during the same period. In addition to interest, the other related capitalized costs of debt were commitment fees on short-term debt agreements, debt discount amortization, and amortization of long-term debt expenses for the

applicable period. This produced the total interest and financing costs capitalized on the project through August 31, 1977, the projected date for the first delivery of oil at Valdez.

To summarize, the original cost of construction used in the ICC Valuation process consists of (1) the "As-Adjusted" expenditures by primary ICC account; (2) engineering and G&A overheads; and (3) interest capitalized during the construction period. (See Schedule 8, page 2).

COST OF REPRODUCTION NEW

The annual indices published by the Commission for 1969 through 1975, and the preliminary 1976 indices released by the Commission were used as a base to estimate annual indices for 1977 through 1982. These annual indices by primary account were inflated for the periods 1977 through 1982 based on inflation rates as follows: 1977 through 1980 —8%; 1981—7.8% and 1982—7.6%.

The period indices were calculated for each year by averaging the annual indices by primary account for the preceding three years, the current year and the subsequent year. This is the method of calculation used by the ICC. (Oak Statement at 18).

These annual and period indices were then applied to original cost construction expenditures by primary account to calculate the cost of reproduction new (CRN) following the ICC methodology as described below. First, all expenditures were reduced to 1947 dollars through the use of the annual indices. This was accomplished by dividing each year's "As-Adjusted" original cost expenditures for each primary account by the appropriate annual index for that particular account for the year in which the expenditure was made. (This accomplishes the same results as the use of 1947 period guide prices referred to in Oak State-

ment at 17.) Cost of Reproduction New (CRN) for 1977 through 1980 was then calculated by multiplying the 1947 base costs for each primary ICC account by the appropriate period indices, determined as described above. The technique of applying annual indices to expenditures by year of expenditure to arrive at 1947 base costs is considered to be an appropriate application of ICC methodology for a project whose period of construction extends over a number of years.

Engineering and G&A overhead percents were then applied to the CRN totals of accounts 153-165. The overhead percents were determined based on the relationship of the actual overheads to original cost excluding overheads.

Interest capitalized during construction was applied to the total of the above at the 6% annual rate historically used in ICC methodology. The period used for capitalization of interest was two years, which is one-half the construction period plus three months. The 12% total rate was developed through use of the following ICC formula:

$$\frac{\frac{42+3}{2}}{12} \times 6\% = 12\%$$

CONDITION PERCENTS

Since Section 19a of the Interstate Commerce Act requires that the ICC determine the cost of reproduction new less depreciation, some measure of depreciation must be applied to the current period cost of reproduction new. The condition percent factor, as used by the Commission, is the ratio of the remaining probable life of the property at an attained age to its total probable life. The application of this factor to the cost of reproduction new is intended by the ICC to produce a reasonable estimate of the value of the property in its present condition.

Protest Reply of ARCO Pipe Line.

The ICC has published two tables of condition percents; one for pipe and fittings and the other for building and machinery (See Oak Statement, Appendix D thereto, page 3). The condition percents relating to pipe and fittings were applied to the expenditures in accounts 153 through 155 and the condition percents relating to the building and machinery category were applied to accounts 156 through 165.

A condition percent of 100% was used for 1977 CRN, since the pipeline began operation as a new facility in 1977. The 1977 CRN times the appropriate condition percent for one year old property was used in the calculation of the valuation used for 1978. A similar procedure, taking into account additional years of use, was employed to calculate CRN for 1979, 1980 and 1981. (Note that CRN in Columns 2 and 5 on page 7 of Schedule 8 are the same amounts.)

Additions to the project after the initial start-up date of September 1, 1977, have been accounted for separately and the appropriate condition percents applied to these additions. The condition percent for the additions required for the 1980 expansion was set at 100% in 1981, the first year the expansion was included in the valuation.

For purposes of applying condition percents on additions to the project, all additions subsequent to the date of the initial in-service date are expected to be in the building and machinery category and the appropriate condition percents for this category have been applied. (See Schedule 8, page 7.)

GOING CONCERN

An amount equivalent to 6% of the weighted average cost is added to valuation for the intangible value of a going concern. This is consistent with historical ICC procedure. (Oak Statement at 25).

Protest Reply of ARCO Pipe Line.

LAND AND RIGHTS-OF-WAY

In lieu of making actual appraisals, valuations currently include land values estimated at 50% of original cost. Therefore 50% of the actual cost of land was used to estimate present value. This is consistent with current ICC procedure which values land at one-half of original cost. (Oak Statement at 21). Because of the immaterial cost ($.2 million), 100% of the actual cost of rights-of-way was used in estimating valuation each year.

WORKING CAPITAL

Working capital was estimated by making allowance for the funds necessary to meet current operating expenses which must be paid in advance of receipts of operating revenues from carrier operations. A 15-day lag between the payment of expenses and the receipt of revenues was utilized. The value of material and supplies on hand was estimated to be zero.

EXPANSION

The additional pumping stations to be added in 1980 entered into the Valuation used to calculate the tariff in the year following their in-service date. The same methodology was used to determine reproduction cost new for expansion additions as was used for construction costs in the original system.

The valuation as determined was then used as the earnings base in the calculation of earnings.

Protest Reply of ARCO Pipe Line.

VALUATION COMPUTATION

As set forth in the Oak Statement at 27, the computation of a single sum valuation has been reduced to the formula below:

$$V = \left[\left(\frac{CRN}{CRN+OC}\right) \times (CRN) + \left(\frac{OC}{CRN+OC}\right) \times (OC) \times \left(\frac{CRNLD}{CRN}\right)\right] \times (1.06) + (L+ROW+WC)$$

V	=	Single-sum value (valuation)
CRN	=	Cost of reproduction new
CRNLD	=	Cost of reproduction new, less depreciation
OC	=	Original cost
L	=	Present value of lands
ROW	=	Present value of rights-of-way
WC	=	Working capital

In practice the CRN less depreciation is separately determined for (1) Pipe and Fittings, (2) Building and Machinery, and (3) additions in different years, using the appropriate percent from the Condition Percent Tables. A weighted average condition percent is computed using the total of CRN and CRNLD for all properties. (See Schedule 8, page 7.)

TARIFF COMPUTATION

The $6.04 per barrel tariff is an average based on operations for years 1977 through 1981. (See Schedule 1). Utilizing this period, the following earnings and operating expenses are anticipated for the period from September 1, 1977 to December 31, 1981:

Protest Reply of ARCO Pipe Line.

(Unless otherwise indicated, dollar figures are in millions.)

Operation and maintenance		$ 266.7
Depreciation		345.3
Interest		561.2
Alaska Taxes—		
Gross Receipts	$ 6.6	
Ad valorem	152.5	
Income	104.4	
Total Alaska Taxes		263.5
Dismantling costs		52.9
Federal income taxes		552.6
Return on investment		598.8
Total		$2,641.0
Estimated throughput (Millions of barrels)		437.0
Tariff rate (Dollars per barrel)	$ 6.04	

THROUGHPUT ASSUMPTIONS

Throughput estimates used as a basis for determining the tariff were .6 million barrels per day (MBD) from September 1, 1977 to October 31, 1977; 1.2 MBD from November 1, 1977 to June 30, 1980; and 1.6 MBD from July 1, 1980 to December 31, 1981.

ARCO Pipe Line's portion of the throughput was determined by applying its 21% ownership factor to the throughput assumptions listed above.

OPERATING AND MAINTENANCE EXPENSE

Estimated operating and maintenance expenses for 1977 and 1978 were supplied by Alyeska. The expenses supplied by Alyeska included all costs with the exception of fuel. Alyeska estimated 30% of the fuel requirements for pump

station #12 and the Valdez terminal, the only fuel which Alyeska itself would purchase. The balance of the fuel attributable to its throughput will be purchased by ARCO Pipe Line. Therefore, it was necessary to estimate costs for the remaining fuel requirements at pump station #12 and the other pump stations based on the consumption of natural gas and turbine fuel at the throughput levels shown above. The estimated price per barrel of turbine fuel and MCF of natural gas was based on estimated 1977 price levels escalated by the same annual inflation rates discussed under "Cost of Reproduction New" above. Operating and maintenance expenses subsequent to 1978, exclusive of fuel, were estimated using the total 1978 estimated operating expenses, excluding nonrecurring maintenance of haul roads to be turned over to the State, increased by the same annual inflation rates.

PROVISION FOR DISMANTLING COST

Dismantling and restoration costs were estimated by Alyeska to total $1.049 billion (at 1977 price levels). ARCO Pipe Line's 21% portion amounts to $220.3 million. The cost estimated at year 2002 price levels was determined using the same annual inflation rates mentioned under "Cost of Reproduction New" above through 1982 and declining rates thereafter through 1990 (reduced .2% annually). A 6% rate was used from 1991 through 2002. Through this procedure, it was estimated that ARCO Pipe Line would need approximately $1.096 billion in year 2002 (the end of the useful life of TAPS) to cover its 21% portion of the dismantling costs. (See Schedule 3, page 2). The inflated dismantling cost ($1.096 billion) was then used to calculate the necessary annual cost to be charged customers which together with interest earnings at a rate of 7.5% compounded monthly (an effective annual rate of approximately 7.76%) would accumulate to ARCO Pipe Line's projected year 2002 requirement of $1.096 billion.

In addition, it was assumed that the provision for dismantling costs would not be deductible for income tax purposes. Consequently, ARCO Pipe Line would be required to pay income taxes on the amounts collected with respect to the provisions. This payment of income tax results in a reduced rate of retirement of debt, which in turn causes interest expense to be greater. The increased interest due to the required use of funds to pay added taxes is another cost of providing the reserve for dismantling. Over the 25-year life of the system, such amounts total $315.4 million. The total cost of $1.411 billion ($1.096 billion plus $.315 billion equals $1.411 billion) was allocated over the 25-year life of the facilities so that approximately equal charges (in terms of 1977 dollars) will be included each year. The same annual inflation rates mentioned above were used to adjust for the effects of inflation in making this allocation. The resulting charges (details of which are on Schedule 3, page 1) are as follows (in millions):

Year	Annual Amount	Total
1977	$ 4.1	$ 4.1
1978 through 1981	12.2	48.8
1982 through 1986	14.7	73.5
1987 through 1991	16.4	82.0
1992 through 1996	17.8	89.0
1997 through 2001	18.4	92.0
2002	15.0	15.0
		$404.4
Anticipated interest income at 7.76%		691.7
Total Fund		$1,096.1

Protest Reply of ARCO Pipe Line.

DEPRECIATION PROVISIONS

A useful life of 25 years was used for book depreciation purposes based on studies by certain producers showing production declining in 2002 to the level that continuing operation of the system will be uneconomical because declining throughput will drive the tariff to levels which would price North Slope Oil out of the market.

INTEREST COSTS

Interest costs by year were calculated based on the estimated outstanding debt as of September 1, 1977, the mandatory retirements scheduled for long-term debt and additional retirements of (or purchases of) commercial paper permitted by available cash flows from depreciation and net deferred taxes. It was assumed that any cash in excess of current requirements would be invested in commercial paper with a 6-½% interest rate. Estimated income on such short term investments was used as a reduction of interest expense for tariff calculations. (See Schedule 6).

STATE OF ALASKA AD VALOREM TAXES

Ad valorem taxes were based on a 2% rate applied to original cost (other than interest capitalized during construction) less applicable book depreciation accumulated as of the beginning of each year, adjusted for inflation. (See Schedule 4).

STATE OF ALASKA GROSS RECEIPTS TAXES

Gross receipts taxes were based on the current effective rate of ¼ of 1% of total revenues.

Protest Reply of ARCO Pipe Line.

FEDERAL AND STATE OF ALASKA INCOME TAXES

State income taxes were calculated based on a state income tax rate of 9.4%, adjusted to 8.3% to reflect the anticipated multiple state taxable income allocation provisions to which the State of Alaska subscribes. Federal income taxes were calculated at 48% of income before income taxes after deduction of the state income tax provision at 8.3%. (See Schedule 7).

Income taxes were calculated at appropriate federal and state income tax rates assuming full inter-period income tax allocation (sometimes referred to as normalization). Consequently, deferred federal and state income taxes were provided for timing differences arising from accelerated depreciation, current deduction of interest and taxes capitalized on the books and a 60-month amortization for tax purposes of research and development costs depreciated at 4% per year on the books. This is consistent with accounting requirements of the Commission.

No cash flow benefits of accelerated tax deductions are realized by ARCO Pipe Line until such amounts would be realized on the basis of a separate income tax return.

RETURN ON VALUATION

Return on valuation was calculated at 7% of the calculated valuation over the period to the end of the fourth full year of operations. (See Schedule 1).

SCHEDULE 2
Page 1 of 3

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

INITIAL TARIFF - INCOME SUMMARY

1977-1981

Line No.	Description	Schedule No.	(Col. 1) 1977	(Col. 2) 1978	(Col. 3) 1979	(Col. 4) 1980	(Col. 5) 1981	(Col. 6) 1977-1981 Total
					(millions)			
1	Estimated through-put (millions of barrels)		23.038	91.980	91.980	107.310	122.640	436.968
2	Tariff rate (dollars per barrel)		$6.044	$6.044	$6.044	$6.044	$6.044	$6.044
3	Revenues		$139.4	$555.9	$555.9	$648.6	$741.2	$2,641.0
	Operating expenses:							
4	Operations and maintenance	2	22.3	53.6	56.1	63.4	71.3	266.7
5	Provision for dismantling cost	3	4.1	13.2	13.2	13.2	13.2	52.9
6	Ad Valorem taxes	4	8.6	34.3	34.2	35.4	40.0	152.5
7	Gross receipts taxes (1/4 of 1% of Line 3)		.3	1.4	1.4	1.6	1.9	6.6
8	Provision for depreciation	5	25.7	77.2	77.2	80.8	84.4	345.3
9	Interest	6	48.1	139.0	128.1	123.2	122.8	561.2
10	Total operating expenses		109.1	317.7	309.2	316.6	332.6	1,385.2
11	Income before income taxes		30.3	238.2	246.7	332.0	408.6	1,255.8
12	Provision for income taxes	7	15.8	124.6	129.0	173.7	213.9	657.0
13	Net income		$ 14.5	$113.6	$117.7	$158.3	$194.7	$ 598.8
14	% of valuation	8	$ 48.7	$137.1	$133.3	$133.6	$144.1	$ 598.8

SCHEDULE 1
Page 1 of 1

SCHEDULE 2
Page 1 of 3

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

SUMMARY OF OPERATING EXPENSES

1977-1981

Line No.	Description	(Col. 1) 1977	(Col. 2) 1978	(Col. 3) 1979	(Col. 4) 1980	(Col. 5) 1981
				(millions)		
1	Operating and maintenance expense	$ 99.4	$223.8	$233.5	$252.2	$271.8
2	Fuel costs - Natural gas (p. 2, Line 17)	4.3	17.4	18.8	27.5	37.4
3	Turbine fuel (p. 3, Line 12)	2.6	13.8	14.9	22.1	30.3
4	Total operating and maintenance expenses	$106.3	$255.0	$267.2	$301.8	$339.5
5	ARCO portion (21%) (To Schedule 1, Line 4)	$ 22.3	$ 53.6	$ 56.1	$ 63.4	$ 71.3

SCHEDULE 2
Page 1 of 3

SCHEDULE 2
Page 2 of 3

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

CALCULATION OF NATURAL GAS COST

1977 - 1981

Line No.	Description	(Col. 1) 1977	(Col. 2) 1978	(Col. 3) 1979	(Col. 4) 1980	(Col. 5) 1981
1	Through-put assumptions (millions of barrels per day)	.6 Sept.-Oct. 1.2 Nov.-Dec.	1.2	1.2	1.4	1.6
	Natural Gas Consumption -					
2	MMCF at .6 MBPD	12.7	-	-	-	-
3	Days Pumped	61	-	-	-	-
4		774.7	-	-	-	-
5	MMCF at 1.2 - MBPD	21.0	21.0	21.0	21.0	-
6	Days Pumped	61	365	365	182.5	-
7		1,281.0	7,665.0	7,665.0	3,832.50	-
8	MMCF at 1.6 - MBPD	-	-	-	35.9	35.9
9	Days Pumped	-	-	-	182.5	365
10		-	-	-	6,551.75	13,103.5
11	Total Natural Gas Consumption in MMCF (Lines 4 + 7 + 10)	2,055.7	7,665.0	7,665.0	10,384.25	13,103.5
	Price per MMCF -					
12	1977 MCF Price	$2.10				
13		x 1,000				
14	Prior Year Price		$2,100	$2,268	$2,449.4	$2,645.4
15	Inflation Rate		x 1.08	x 1.08	x 1.08	x 1.078
16	Price per MMCF	$2,100	$2,268	$2,449.4	$2,645.4	$2,851.7
17	Total cost (Line 11 x Line 16) (To Page 1, Line 2)	$4.3 M	$17.4 M	$18.8 M	$27.5 M	$37.4 M

SCHEDULE 2
Page 3 of 3

ARCO PIPE LINE COMPANY

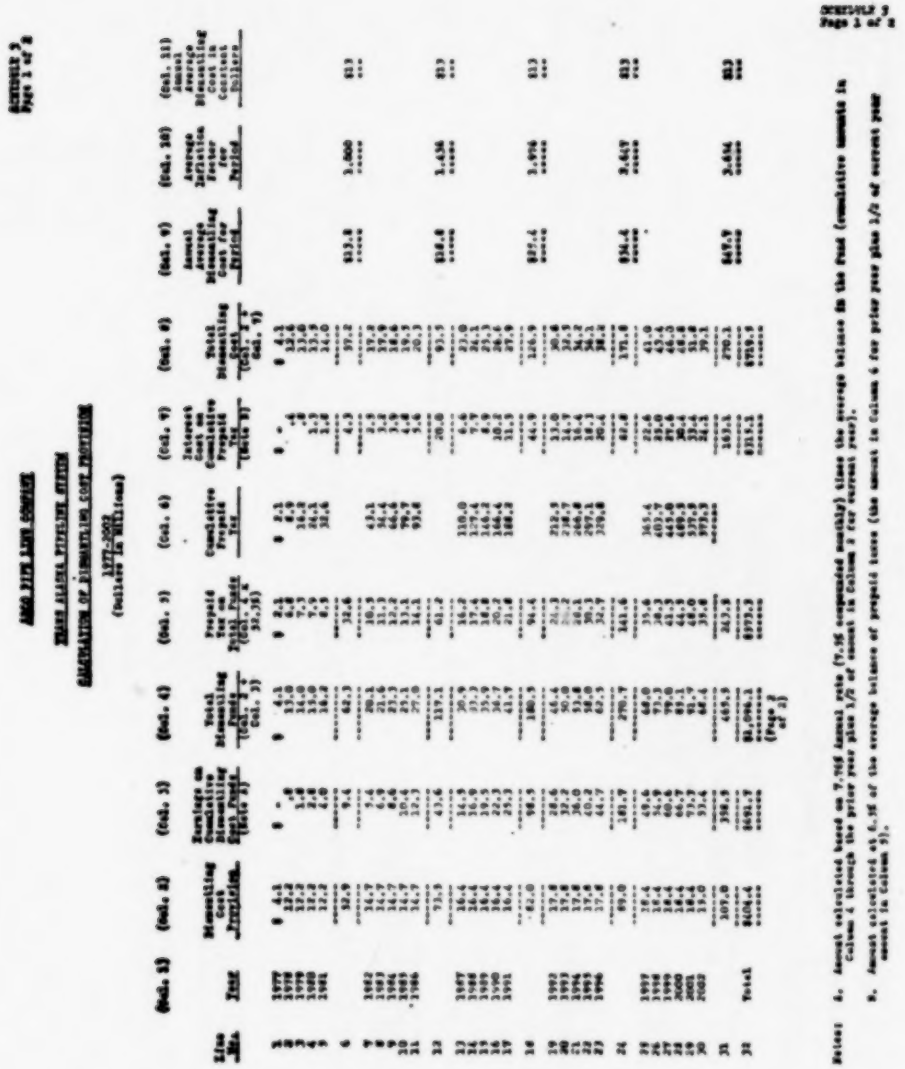
TRANS ALASKA PIPELINE SYSTEM

CALCULATION OF TURBINE FUEL COST

1977 - 1981

Line No.	Description	(Col. 1) 1977	(Col. 2) 1978	(Col. 3) 1979	(Col. 4) 1980	(Col. 5) 1981
1	Through-put Assumptions (millions of barrels per day)	.6 Sept.-Oct. 1.2 Nov.-Dec.	1.2	1.2	1.4	1.6
	Turbine fuel cost:					
2	Barrels per period consumed	355,053	1,734,619	1,734,619	2,388,143	3,041,667
	Price per barrel:					
3	Price before current period inflation	$6.97	$6.97	$7.53	$8.13	$8.78
4	Inflation factor	1.00%	1.08%	1.08%	1.08%	1.078%
5	Price per barrel inflation adjusted	$6.97	$7.53	$8.13	$8.78	$9.46
6						
6	Cost (Line 2 X Line 5)	$2.5 M	$13.1 M	$14.1 M	$21.0 M	$28.8 M
	Degradation costs:					
7	Gross barrels per period (Line 2 ÷ .22)	1,613,877	7,884,632	7,884,632	10,855,195	13,825,759
8	Barrels per period consumed (Line 2)	(355,053)	(1,734,619)	(1,734,619)	(2,388,143)	3,041,667
9	Degraded barrels per period	1,258,824	6,150,013	6,150,013	8,467,052	10,784,092
10	Degraded cost per barrel, inflation adjusted	10.5¢	11.3¢	12.2¢	13.2¢	14.2¢
11	Degradation cost Line	$ .1 M	$ .7 M	$ .8 M	$ 1.1 M	$ 1.5 M
12	Total turbine fuel cost (Line 6 + Line 11)	$ 2.6 M	$13.8 M	$14.9 M	$22.1 M	$30.3 M

Protest Reply of ARCO Pipe Line.



Protest Reply of ARCO Pipe Line.

SCHEDULE 3
Page 2 of 2

ARCO PIPE LINE COMPANY
TRANS ALASKA PIPELINE SYSTEM
CALCULATION OF DISMANTLING COST PROVISION
1977-2002

Line No.	Description	(Col. 1) Annual Inflation Rate	(Col. 2) Amount (millions)
1	Estimated cost of dismantling and restoration as of August 31, 1977		$1,049.0
	Amount estimated at each year-end, adjusted for inflation—		
2	1977	8.0%	1,077.0
3	1978	8.0%	1,163.2
4	1979	8.0%	1,256.3
5	1980	8.0%	1,356.8
6	1981	7.8%	1,462.6
7	1982	7.6%	1,573.8
8	1983	7.4%	1,690.3
9	1984	7.2%	1,812.0
10	1985	7.0%	1,938.8
11	1986	6.8%	2,070.6
12	1987	6.6%	2,207.3
13	1988	6.4%	2,348.6
14	1989	6.2%	2,494.2
15	1990	6.0%	2,643.9
16	1991	6.0%	2,802.5
17	1992	6.0%	2,970.7
18	1993	6.0%	3,148.9
19	1994	6.0%	3,337.8
20	1995	6.0%	3,538.1
21	1996	6.0%	3,750.4
22	1997	6.0%	3,975.4
23	1998	6.0%	4,213.9
24	1999	6.0%	4,466.7
25	2000	6.0%	4,734.7
26	2001	6.0%	5,018.8
27	2002	6.0%	5,219.6
28	ARCO's portion (Line 27 x 21%)		$1,096.1

(To p. 1, Line 32, Col. 4)

SCHEDULE 4
Page 1 of 1

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

CALCULATION OF AD VALOREM TAX

Line No.	Description	Source	(Col. 1) 1977	(Col. 2) 1978	(Col. 3) 1979	(Col. 4) 1980	(Col. 5) 1981
					(millions)		
1	Estimated furnished by Alyeska		$8.6	$34.3			
	Ad Valorem Tax Base:						
	Depreciable plant in service at August 31, 1977, excluding interest capitalized						
2		Schedule 5, Line 2			$1,671.4	$1,671.4	$1,671.4
	Less- Depreciation for -						
3	1977	(Line 2 X 4% X 4/12)			(22.3)	(22.3)	(22.3)
4	1978	(Line 2 X 4%)			(66.9)	(66.9)	(66.9)
5	1979	(Line 2 X 4%)			-	(66.9)	(66.9)
6	1980	(Line 2 X 4%)			-	-	(66.9)
7	Tax base of initial plant in service				1,582.2	1,515.3	1,448.4
	Additions to depreciable plant in service as of June 30, 1980, excluding interest capitalized						
8		Schedule 8, p. 6, Line 6			-	-	146.6
9	Less- Depreciation for 1980	(Line 8 X 4.5% X 6/12)			-	-	(3.3)
10	Tax base of 1980 additions				-	-	143.3
11	Total tax base	(Line 7 & 10)			$1,582.2	$1,515.3	$1,591.7
12	Tax on original cost basis	(Line 11 X 2%)			$ 31.7	$ 30.3	$ 31.8
13	Cumulative inflation rate factor as of beginning of year				1.06%	1.17%	1.26%
		(1.06 X 1.06)					
		(1.17 X 1.06)					
14	Estimated tax for year.	(To Schedule 1, Line 6)	$8.6	$34.3	$ 34.2	$ 35.4	$ 40.0

SCHEDULE 5
Page 1 of 1

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

SCHEDULE OF DEPRECIATION EXPENSE

1977-1981

Line No.	Description	Source	(Col. 1) 1977	(Col. 2) 1978	(Col. 3) 1979 (millions)	(Col. 4) 1980	(Col. 5) 1981
	DEPRECIABLE PLANT:						
1	Initial plant - Construction expenditures at August 31, 1977 (excluding land of $15)	Schedule 8, p.2, Col. 10 Line 19	$7,959	$7,959	$7,959	$7,959	$7,959
2	ARCO portion	Line 1 x 21%	$1,671.4	$1,671.4	$1,671.4	$1,671.4	$1,671.4
3	Add - Interest capitalized	Schedule 8, p.2	257.7	257.7	257.7	257.7	257.7
4	Depreciable plant in service, August 31, 1977		$1,929.1	$1,929.1	$1,929.1	$1,929.1	$1,929.1
5	Expansion of depreciable plant in service in 1980	Schedule 8, p.2	$ -	$ -	$ -	$ 159.3	$ 159.3
	DEPRECIATION EXPENSE:						
6	Depreciable plant in service, August 31, 1977	Line 4 x 4% x no. of months in period ÷ 12	$ 25.7	$ 77.2	$ 77.2	$ 77.2	$ 77.2
7	Expansion of depreciable plant in service in 1980	Line 5 x 4.5% x no. of months in period ÷ 12	-	-	-	3.6	7.2
8	Total depreciation expense	Schedule 1, Line 8	$ 25.7	$ 77.2	$ 77.2	$ 80.8	$ 84.4

SCHEDULE 6
Page 1 of 2

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

DETAIL OF INTEREST EXPENSE

1977-1981

Line No.	Description	Source	(Col. 1) 1977	(Col. 2) 1978	(Col. 3) 1979 (millions)	(Col. 4) 1980	(Col. 5) 1981
1	Long-term debt	P. 2, Line 13	$46.4	$139.3	$139.2	$137.7	$134.2
2	Amortization of debt discount and expense ($21.1 million amortized over life of debt)	P. 2, Line 19	.7	2.1	2.1	2.1	2.1
3	Commercial paper	P. 2, Line 24	1.0	(2.4)	(13.2)	(16.4)	(13.5)
4	Total	Schedule 1, Line 9	$48.1	$139.0	$128.1	$123.2	$122.8

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

DETAIL OF INTEREST EXPENSE

1977-1981

Line No.	Description	(Col.1) Interest Rate	(Col.2) 1977-1981 Retirement Terms	(Col.3) Principal Amount Outstanding At August 31, 1977 (millions)	(Col.4) 1977	(Col.5) 1978	(Col. 6) 1979	(Col. 7) 1980	(Col. 8) 1981
					Interest Expense For				
	Long-term debt:								
1	Chase Manhattan	7.25%	Due 2/5/80	$ 25.0	$ .6	$ 1.6	$ 1.6	$ .2	$ -
2	Metropolitan Life	7.75%	$2 million per year beginning 6/7/79)	40.0	1.0	3.1	3.0	2.9	2.7
	ARCO Pipe Line Series Bonds -								
3	Series 1	6.70%	Due 11/1/81	200.0	5.8	17.4	17.4	17.4	14.5
4	Series 2	8.00%		250.0	6.7	20.0	20.0	20.0	20.0
5	Series 3	8 3/8%		250.0	7.0	20.9	20.9	20.9	20.9
6	Series 4	8.00%		200.0	5.3	16.0	16.0	16.0	16.0
7	Series 5	7.50%		150.0	3.7	11.3	11.3	11.3	11.3
8	Series 6	7.75%		150.0	3.9	11.6	11.6	11.6	11.6
9	Valdez Industrial Revenue Bonds	5.95%		265.0	5.2	15.7	15.7	15.7	15.7
10	Private placement	8 3/8%		125.0	3.5	10.5	10.5	10.5	10.5
11	Master Note Bank Loans	6.3%		169.0	3.7	11.0	11.0	11.0	11.0
12	Total long-term debt			$1,624.0					
13	Interest on long-term debt (to p. 1, Line 1)				$ 46.4	$139.3	$ 139.2	$ 137.5	$ 134.2
	Commercial paper:								
14	Balance at beginning of period				$ 63.5	$ 28.0	$ (74.1)	$(126.1)	$(212.2)
15	Add - 1980 expansion expenditures				-	49.4	74.6	35.2	-
16	Long-term debt retirement				-	-	2.0	27.0	202.0
17	Less - depreciation funds (Schedule 5, p.1, Line 8)				(25.7)	(77.2)	(77.2)	(80.8)	(84.4)
18	Deferred tax funds				(9.1)	(72.2)	(51.3)	(63.4)	(105.5)
19	Amortization of debt expense (to p.1, Line 2)				(.7)	(2.1)	(2.1)	(2.1)	(2.1)
20	Balance at end of period				$ 28.0	$(74.1)	$(128.1)	$(212.2)	$(202.2)
21	Average balance for period (Line 14 + 20 ÷ 2)				$ 45.7	$(23.1)	$(101.1)	$(170.2)	$(207.2)
22	Interest expense (Line 21 x 6.5%)				$ 1.0	$ (1.5)	$ (6.6)	$ (11.2)	$ (13.5)
23	Interest capitalized on 1980 expansion (to Schedule 7, Line 7)				-	(.9)	(6.6)	(5.2)	-
24	Interest expense on commercial paper (to p.1, Line 3)				$ 1.0	$ (2.4)	$ (13.2)	$ (16.4)	$ (13.5)

SCHEDULE 6
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SCHEDULE 7
Page 1 of 1

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

CALCULATION OF INCOME TAX PROVISIONS

1977-1981

Line No.	Description	Source	(Col. 1) 1977	(Col. 2) 1978	(Col. 3) 1979 (Millions)	(Col. 4) 1980	(Col. 5) 1981
	Currently payable:						
1	Income before income taxes	Schedule 1, Line 11	$ 30.3	$ 236.2	$246.7	$332.8	$450.6
	Add-						
2	Provision for depreciation	Schedule 1, Line 8	23.7	77.2	77.2	80.8	84.4
3	Provision for dismantling cost	Schedule 1, Line 9	4.1	12.2	12.2	12.2	12.2
4	Earnings on dismantling fund	Schedule 3, p. 1, Col. 3	-	.8	1.8	2.8	4.0
			60.1	326.4	337.9	427.8	509.2
	Less-						
5	Tax depreciation		91.0	171.5	196.4	143.4	151.7
6	Amortization of research and development costs capitalized ($36.8 million) over 60 months		2.5	7.4	7.4	7.4	7.4
7	Interest during construction capitalized		-	.9	6.6	9.2	-
8	Taxable income (loss)		(33.4)	148.4	107.5	291.8	350.1
9	Less- Net operating loss carry-forward		(205.4)	(238.8)	(90.2)	-	-
10	Taxable income (net operating loss carry-forward)		$(238.8)	$ (90.2)	$ 17.3	$291.8	$350.1
11	State tax payable	Line 10 x 6.5%	$ -	$ -	$ 6.4	$ 20.9	$ 29.1
12	Federal tax payable	Line 10-Line 11 x 48%	-	-	34.0	110.9	154.2
	Deferred:						
13	State -	Line 1 x 6.5%	2.0	15.8	-	-	-
14		Lines 1-10 x 6.5%	-	-	14.1	6.7	6.9
15	Federal -	Lines 1-13 x 48%	13.3	104.8	-	-	-
16		Lines 1-10-14 x 48%	-	-	74.3	35.2	29.7
17	Total income tax expense	Line 1 x 52.32%, To Schedule 1, Line 12	$ 15.8	$ 124.4	$129.0	$171.7	$213.9

SCHEDULE 7
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SCHEDULE 8
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ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

SCHEDULE OF ICC VALUATION

1977-1981

Line No.	Description	Source	(Col. 1) 1977	(Col. 2) 1978	(Col. 3) 1979 (Millions)	(Col. 4) 1980	(Col. 5) 1981
1	Original cost (excludes land and rights-of-way)	P. 2, Line 19, Cols. 11 and 13	$1,929.2	$1,929.2	$1,929.2	$1,929.2	$2,088.5
2	Cost of reproduction new (Note)	P. 8, Line 25	1,998.1	1,998.1	2,144.2	2,331.5	2,687.2
3	Total	Line 1 + Line 2	$3,927.3	$3,927.3	$4,073.4	$4,260.7	$4,775.7
4	Weighted original cost	(Line 1 / Line 3) x Line 1	$ 947.7	$ 947.7	$ 909.2	$ 873.5	$ 913.3
5	Weighted cost of reproduction new	(Line 2 / Line 3) x Line 2	1,016.6	1,016.6	1,144.2	1,275.8	1,512.0
6	Total weighted average	Line 4 + Line 5	1,964.3	1,964.3	2,053.4	2,149.3	2,425.3
7	Weighted condition percent	P. 7, Line 9	100%	93.732%	88.502%	83.502%	79.842%
8	Weighted average, less depreciation	Line 6 x Line 7	1,964.3	1,841.6	1,817.3	1,794.7	1,936.4
9	Going concern	Line 8 x 6%	117.9	110.5	109.0	107.7	116.2
10	Land	P. 2, Line 20, Col. 11 x 30%	1.6	1.6	1.6	1.6	1.6
11	Rights-of-way		.2	.2	.2	.2	.2
12	Working capital		4.0	4.0	4.0	4.0	4.0
13	Valuation	Lines 8 + 9 + 10 + 11 + 12	$2,088.0	$1,957.9	$1,932.1	$1,908.2	$2,058.4
14	7% of valuation (4 months in 1977)	To Schedule 1, Line 14	$ 48.7	$ 137.1	$ 135.3	$ 133.6	$ 144.1

Note: Original cost and CRC for 1977 were used to estimate Valuation for 1977. In all other years the prior year amounts were used.

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

SUMMARY OF ORIGINAL COST

1977-1981

Line No.	Account No.	Description	(Col. 1) 1969	(Col. 2) 1970	(Col. 3) 1971	(Col. 4) 1972	(Col. 5) 1973	(Col. 6) 1974	(Col. 7) 1975	(Col. 8) 1976	(Col. 9) 1977	(Col. 10) Total	(Col. 11) ARCO's 21%	(Col. 12) 1980 Expansion Expenditures	(Col. 13) Total ARCO Original Cost at 12-31-80
			Initial Construction Expenditures												
			(millions)												
1	153	Line Pipe	$14.0	$82.0	$55.0	$ -	$ -	$ -	$ 17.0	$ 14.0	$ -	$ 159.0			
2	154	Line Pipe Fittings	-	-	3.0	-	-	4.0	15.0	40.0	-	62.0			
3	155	Pipeline Construction	12.0	70.0	48.0	10.0	11.0	663.7	2,110.4	1,717.4	376.5	5,253.0			
4		Total Pipe and Fittings										$5,470.0	$1,148.9	$ -	$1,148.9
5	156	Buildings	2.0	3.0	1.0	-	2.0	47.7	102.4	150.4	42.6	$ 352.1		-	
6	157	Boilers	-	-	-	-	-	1.0	7.4	8.4	3.1	20.3		-	
7	158	Pumping Equipment	-	-	-	-	-	6.0	28.0	32.0	2.0	70.0		$136.3	
8	160	Other Station Equipment	-	-	7.0	5.0	1.0	88.2	149.7	273.4	317.5	777.8		-	
9	161	Oil Tanks	-	-	-	1.0	1.0	23.1	123.3	173.9	92.0	414.3		-	
10	162	Delivery Facilities	-	-	-	1.0	1.0	8.3	66.4	114.9	60.7	252.3		-	
11	163	Communication Systems	-	-	-	-	-	-	-	-	3.0	3.0		-	
12	164	Office Furn. and Fixtures	-	-	-	-	-	-	-	-	1.0	1.0		-	
13	169	Vehicles & Other Work Equip.	-	-	-	-	-	-	-	-	30.0	30.0		-	
14		Total Buildings & Machinery										$1,961.2	$ 407.7	$136.3	$ 544.0
		Overheads Capitalized													
15		Engineering										249.0	52.3		
16		General and Administrative										298.0	62.6		
17		Interest During Construction										-	237.7		
18												$ 547.0	$ 352.6	$ 22.8	$ 352.4
19		Total Original Cost, excluding Land and rights-of-way										7,959.0	1,909.2	159.3	2,068.5
20	151	Land										13.0	2.1	-	2.1
21	152	Rights-of-way										1.0	.2	-	.2
22		Total Original Cost										$7,973.0	$1,932.5	$159.3	$2,091.8

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

ANALYSIS OF "AS-ADJUSTED" CONSTRUCTION EXPENDITURES

Line No.	Account No.	Description	(Col.1) As Reported by Alyeska	(Col.2) 1969 Account 162 Reclassification	(Col.3) As Adjusted	(Col.4) As Reported by Alyeska	(Col.5) 1970 Account 162 Reclassification	(Col.6) As Adjusted	(Col.7) As Reported by Alyeska	(Col.8) 1971 Account 162 Reclassification	(Col.9) As Adjusted	(Col.10) As Reported by Alyeska	(Col.11) 1972 Account 162 Reclassification	(Col.12) As Adjusted
			(millions)											
1	151	Land	$-	$	$ -	$-	$	$ -	$-	$	$ -	$-	$ 2	$ 2.0
2	152	Rights-of-way	-		-	-		-	-		-	-		-
3	153	Line Pipe	14		14.0	68		82.0	56		82.0	-		-
4	154	Line Pipe Fittings	-		-	-		-	3		3.0	-		-
5	155	Pipeline Construction	12		12.0	70		70.0	48		48.0	19		19.0
6	156	Buildings	1	0	3.0	1	0	2.0	1		1.0	-		-
7	157	Boilers	-		-	-		-	-		-	-		-
8	158	Pumping Equipment	-		-	-		-	-		-	-		-
9	160	Other Station Equipment	-		-	-		-	6	1	7.0	4	1	5.0
10	161	Oil Tanks	-		-	-		-	1		-	1		1.0
11	162	Delivery Facilities	2	(2)	-	2	(2)	-	1	(1)	-	3	(4)	1.0
12	163	Communication Systems	-		-	-		-	-		-	-		-
13	164	Office Furniture & Fixtures	-		-	-		-	-		-	-		-
14	169	Vehicles & Other Work Equip.	-		-	-		-	-		-	-		-

NOTE: The amounts as reported by Alyeska are taken from page 4 of this Schedule and the amounts from Account 162 reclassifications are taken from page 5.

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Page 3a of 10

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

ANALYSIS OF "AS-ADJUSTED" CONSTRUCTION EXPENDITURES

Line No.	Account No.	Description	(Col.13)	(Col.14) 1973	(Col.15)	(Col.16)	(Col.17) 1974	(Col.18)	(Col.19)	(Col.20) 1975	(Col.21)	(Col.22)	(Col.23) 1976	(Col.24)
			As Reported by Alyeska	Account 162 Reclassi-fication	As Adjusted	As Reported by Alyeska	Account 162 Reclassi-fication	As Adjusted	As Reported of Alyeska	Account 162 Reclassi-fication	As Adjusted	As Reported by Alyeska	Account 162 Reclassi-fication	As Adjusted
								(millions)						
1	151	Land	$-	$ 1	$ 1.0	$ 1	$ 9.0	$ 10.0	$ 1	$	$ 1.0	$ 1	$	$ 1.0
2	152	Rights-of-way	-		-	1		1.0	-		-	-		-
3	153	Line Pipe	-		-	-		-	12	5.0	17.0	5	9.0	14.0
4	154	Line Pipe Fittings	-		-	4		4.0	9	6.0	15.0	22	18.0	40.0
5	155	Pipeline Construction	10	1	11.0	681	2.7	683.7	2,066	22.6	2,110.6	1,669	48.4	1,717.4
6	156	Buildings	1	1	2.0	23	24.7	47.7	73	29.6	102.6	101	49.6	150.6
7	157	Boilers	-		-	1		1.0	6	1.4	7.4	4	4.8	8.8
8	158	Pumping Equipment	-		-	6		6.0	29		29.0	33		33.0
9	160	Other Station Equipment	-	1	1.0	20	8.2	28.2	58	87.7	145.7	133	140.4	273.4
10	161	Oil Tanks	-	1	1.0	8	15.1	23.1	13	110.3	123.3	19	154.9	173.9
11	162	Delivery Facilities	6	(5)	1.0	66	(59.7)	6.3	329	(262.6)	66.4	540	(425.1)	114.9
12	163	Communication Systems	-		-	-		-	-		-	-		-
13	164	Office Furniture & Fixtures	-		-	-		-	-		-	-		-
14	165	Vehicles & Other Work Equip.	-		-	-		-	-		-	-		-

SCHEDULE E
Page 3b of 10

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

ANALYSIS OF "AS-ADJUSTED" CONSTRUCTION EXPENDITURES

Line No.	Account No.	Description	(Col.25)	(Col.26) 1977	(Col.27)	(Col.28)
			As Reported by Alyeska	Account 162 Reclassi-fication	As Adjusted	Total as Adjusted at 6-31-77
					(millions)	
1	151	Land	$ -	$	$ -	$ 15.0
2	152	Rights-of-way	-		-	1.0
3	153	Line Pipe	-		-	155.0
4	154	Line Pipe Fittings	-		-	62.0
5	155	Pipeline Construction	550	24.1	574.1	5,253.8
6	156	Buildings	7	35.6	42.6	352.5
7	157	Boilers	-	3.1	3.1	20.3
8	158	Pumping Equipment	2		2.0	70.0
9	160	Other Station Equipment	238	79.5	317.5	777.8
10	161	Oil Tanks	1	91.0	92.0	414.3
11	162	Delivery Facilities	294	(233.3)	60.7	252.3
12	163	Communication Systems	3		3.0	3.0
13	164	Office Furniture & Fixtures	1		1.0	1.0
14	165	Vehicles & Other Work Equip.	50		50.0	50.0

Protest Reply of ARCO Pipe Line.

SCHEDULE F
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ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

ANALYSIS OF CONSTRUCTION EXPENDITURES AS REPORTED BY ATLESKA

Line Account No.	Acct. No.	Description	(Col. 1) 1969	(Col. 2) 1970	(Col. 3) 1971	(Col. 4) 1972	(Col. 5) 1973	(Col. 6) 1974	(Col. 7) 1975	(Col. 8) 1976	(Col. 9) 1977	(Col. 10) Total as of 8-31-77
							(millions)					
1	151	Land-										
2		Direct expenditures (p. 3, Line 1)	$ -	$ -	$ -	$ -	$ -	$ 1	$ 1	$ 1	$ -	$ 3
3		Engineering and G & A Overheads	-	-	-	-	-	-	-	-	-	-
4		Total	-	-	-	-	-	1	1	1	-	3
5	152	Rights-of-way-										
6		Direct expenditures (p. 3, Line 2)	-	-	-	-	-	1	-	-	-	1
7		Engineering and G & A Overheads	-	-	-	-	-	-	-	-	-	-
8		Total	-	-	-	-	-	1	-	-	-	1
9	153	Line Pipe-										
10		Direct expenditures (p. 3, Line 3)	14	83	38	-	-	-	12	3	-	141
11		Engineering and G & A Overheads	-	-	-	-	-	-	-	-	-	-
12		Total	14	83	38	-	-	-	12	3	-	141
13	154	Line Pipe Fittings-										
14		Direct expenditures (p. 3, Line 4)	-	-	3	-	-	4	9	22	-	38
15		Engineering and G & A Overheads	-	-	-	-	-	-	-	-	-	-
16		Total	-	-	3	-	-	4	9	22	-	38
17	155	Pipeline Construction-										
18		Direct expenditures (p. 3, Line 5)	12	78	46	29	33	681	2,088	1,469	332	5,171
19		Engineering and G & A Overheads	4	15	19	17	23	36	115	93	30	352
20		Total	16	93	65	36	33	717	2,203	1,562	30	5,523
21	156	Buildings-										
22		Direct expenditures (p. 3, Line 6)	1	1	1	-	1	23	73	111	7	218
23		Engineering and G & A Overheads	-	-	-	1	1	2	12	6	-	21
24		Total	1	1	1	1	2	25	85	117	7	239
25	157	Boilers-										
26		Direct expenditures (p. 3, Line 7)	-	-	-	-	-	1	6	4	-	11
27		Engineering and G & A Overheads	-	-	-	-	-	-	1	-	-	1
28		Total	-	-	-	-	-	1	7	4	-	12
29	158	Pumping Equipment-										
30		Direct expenditures (p. 3, Line 8)	-	-	-	-	-	7	29	32	4	72
31		Engineering and G & A Overheads	-	-	-	-	-	-	4	4	-	8
32		Total	-	-	-	-	-	7	33	36	4	80
33	160	Other Station Equipment-										
34		Direct expenditures (p. 3, Line 9)	-	-	-	4	4	21	122	173	238	562
35		Engineering and G & A Overheads	-	-	-	-	-	-	4	15	37	56
36		Total	-	-	-	4	4	21	126	188	275	618
37	161	Oil Tanks-										
38		Direct expenditures (p. 3, Line 10)	-	-	-	-	-	6	33	2	1	42
39		Engineering and G & A Overheads	-	-	-	-	-	-	3	3	-	6
40		Total	-	-	-	-	-	6	36	5	1	48
41	162	Delivery Facilities-										
42		Direct expenditures (p. 3, Line 11)	2	3	3	6	6	48	339	340	778	1,527
43		Engineering and G & A Overheads	1	-	-	-	-	1	11	13	21	47
44		Total	3	3	3	6	6	49	350	353	799	1,574
45	163	Communication System-										
46		Direct expenditures (p. 3, Line 12)	-	-	-	-	-	-	-	-	3	3
47		Engineering and G & A Overheads	-	-	-	-	-	-	-	-	-	-
48		Total	-	-	-	-	-	-	-	-	3	3
49	164	Office Furniture and Fixtures-										
50		Direct expenditures (p. 3, Line 13)	-	-	-	-	-	-	-	-	1	1
51		Engineering and G & A Overheads	-	-	-	-	-	-	-	-	-	-
52		Total	-	-	-	-	-	-	-	-	1	1
53	165	Vehicles and Other Work Equipment-										
54		Direct expenditures (p. 3, Line 14)	-	-	-	-	-	-	-	-	30	30
55		Engineering and G & A Overheads	-	-	-	-	-	-	-	-	-	-
56		Total	-	-	-	-	-	-	-	-	30	30
57		Total Direct expenditures										97,429
58		Total Engineering and G & A Overheads (p. 2, Line 19, Col. 10)										$ 847

Protest Reply of ARCO Pipe Line.

SCHEDULE F
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ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

ANALYSIS OF CONSTRUCTION EXPENDITURES AS REPORTED BY ATLESKA

(millions)

Line Account No.	Acct. No.	Description	(Col. 1) 1969	(Col. 2) 1970	(Col. 3) 1971	(Col. 4) 1972	(Col. 5) 1973	(Col. 6) 1974	(Col. 7) 1975	(Col. 8) 1976	(Col. 9) 1977	(Col. 10) Total as of 8-31-77
1	151	Land	$ -	$ -	$ -	$ -	$ -	$ 1	$ 1	$ 1	$ -	$ 3
2	153	Line Pipe	14	83	38	-	-	-	12	3	-	141
3	154	Line Pipe Fittings	-	-	3	-	-	4	9	22	-	38
4	155	Pipeline Construction	16	93	65	36	33	717	2,203	1,562	30	5,523
5	156	Buildings	1	1	1	1	2	25	85	117	7	239
6	157	Boilers	-	-	-	-	-	1	7	4	-	12
7	160	Other Station Equipment	-	-	-	4	4	21	126	188	275	618
8	161	Oil Tanks	-	-	-	-	-	6	36	5	1	48
9	162	Delivery Facilities	3	3	3	6	6	49	350	353	799	1,574
10	Subtotals	Applicable to Report	-	-	-	-	-	-	-	-	3	3
11		Construction Camps & Catering	-	-	-	-	-	-	-	-	1	1
12		Construction Equipment	-	-	-	-	-	-	-	-	30	30
13		Trans Alaska Construction	-	-	-	-	-	-	-	-	-	-
14		Total Direct expenditures	34	180	110	47	45	824	2,828	2,255	1,156	7,479
15		Total Engineering and G & A Overheads	5	15	19	18	24	39	126	99	30	375
16		Total	39	195	129	65	69	863	2,954	2,354	1,186	7,854

(1) Contents have been allocated to accounts 151-165 on a pro-rata basis

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

SCHEDULE OF ORIGINAL COST (1980 EXPANSION)

1978-1980

Line No.	Account No.	Description	(Col. 1) 1978	(Col. 2) 1979	(Col. 3) 1980	(Col. 4) Total
			Construction Expenditures (millions)			
1	158	Pumping equipment	$48.0	$62.6	$25.9	$136.5 (To p. 2, Line 14, Col. 12)
		Overheads capitalized:				
2		Engineering				$ 4.6
3		General and Administrative				5.5
4		Interest during construction				12.7
5		Total overheads capitalized				$ 22.8 (To p. 2, Line 18, Col. 12)
6		Memo: Total cost excluding interest during construction (Lines 1, 2 and 3)				$146.6

SCHEDULE 8
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SCHEDULE 8
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ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

SCHEDULE OF WEIGHTED CONDITION PERCENTS
(Dollars in Millions)

Line No.		(Col. 1) 1977 Condition Percent	(Col. 2) 1977 CRN	(Col. 3) 1977 CRNLD	(Col. 4) 1978 Condition Percent	(Col. 5) 1978 CRN	(Col. 6) 1978 CRNLD	(Col. 7) 1979 Condition Percent	(Col. 8) 1979 CRN	(Col. 9) 1979 CRNLD	(Col. 10) 1980 Condition Percent	(Col. 11) 1980 CRN	(Col. 12) 1980 CRNLD	(Col. 13) 1981 Condition Percent	(Col. 14) 1981 CRN	(Col. 15) 1981 CRNLD
1	Pipe and Fittings	100.0%	$1,249.0	$1,249.0	94.0%	$1,249.0	$1,174.1	89.0%	$1,351.5	$1,202.9	84.0%	$1,455.9	$1,223.0	79.0%	$1,573.5	$1,243.1
2	Buildings and Machinery	100.0	412.5	412.5	93.0	412.5	383.6	87.0	448.1	389.8	82.0	462.9	396.0	77.0	521.8	401.3
3	Additions	-	-	-	-	-	-	-	-	-	-	-	-	100.0	139.3	139.3
4			$1,661.5	$1,661.5		$1,661.5	$1,557.7		$1,799.6	$1,592.7		$1,938.8	$1,619.0		$2,234.0	$1,783.7
5	Weighted Condition Percent (CRNLD divided by CRN) (to page 1)	100.0%			93.752%			88.502%			83.502%			79.842%		

Note: CRN is Cost of Reproduction New and CRNLD is CRN Less Depreciation.

Protest Reply of ARCO Pipe Line.

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

SCHEDULE OF COST OF REPRODUCTION NEW (CRN)

1977-1981

(Dollars in millions)

SCHEDULE 6
Page 6 of 10

Line No.	Account No.	Description	(Col. 1) Expenditures Through 1977 at 1967 Prices (p. 9, Col. 11)	(Col. 2) 1977 Period Index (p. 10, Col. 9)	(Col. 3) 1977 CRN	(Col. 4) 1978 Period Index (p. 10, Col. 10)	(Col. 5) 1978 CRN	(Col. 6) 1979 Period Index (p. 10, Col. 11)	(Col. 7) 1979 CRN	(Col. 8) Expenditures as of 12/31/80 at 1967 Prices (p. 9, Col. 17)	(Col. 9) 1980 Period Index (p. 10, Col. 12)	(Col. 10) 1980 CRN
1	153	Line Pipe	$ 34.44	416	$ 60.07	453	$ 66.46	497	$ 71.77	$ 34.44	537	$ 77.51
2	154	Line Pipe Fittings	3.33	416	11.05	453	15.42	497	16.55	3.33	537	17.88
3	155	Pipeline Construction	499.44	287	1,377.09	330	1,269.26	334	1,367.53	499.44	361	1,478.00
4		Total Pipe & Fittings			$1,249.01		$1,351.54		$1,455.85			$1,573.39
5	156	Buildings	26.58	298	$ 77.61	311	$ 82.66	334	$ 88.78	26.58	361	$ 95.95
6	157	Boilers	1.26	347	4.37	372	4.69	399	5.03	1.26	430	5.42
7	158	Pumping Equipment	4.11	373	15.41	415	17.06	461	18.94	30.70	487	159.29
8	160	Other Station Equipment	41.19	344	142.29	432	177.94	466	191.99	41.19	503	207.19
9	161	Oil Tanks	20.30	419	86.71	474	96.22	511	103.73	20.30	552	112.06
10	162	Delivery Facilities	15.13	374	53.56	384	58.10	413	62.49	15.13	445	67.33
11	163	Communication System	0.22	307	.59	287	.63	309	.68	.22	334	.73
12	164	Office Furn. & Fixtures	0.08	344	.20	263	.21	281	.22	.08	304	.24
13	165	Veh. & Other Work Equip.	2.70	243	9.73	287	10.62	309	11.43	2.70	334	12.54
14		Total Buildings and Machinery			$ 432.47		$ 448.13		$ 482.85			$ 665.53

			1977		1978		1979		1980	
			Pipe & Fitting	Bldg. & Mach.	Pipe & Fitting	Bldg. & Mach.	Pipe & Fitting	Bldg. & Mach.	Pipe & Fitting	Bldg. & Mach.
15		Total CRN	$1,249.0	$432.5	$1,351.5	$448.1	$1,455.9	$482.9	$1,573.5	$660.5
16		Engineering Overheads 3.0% 4.2%	38.6	17.0	41.8	18.5	45.0	19.9	48.6	27.2
17		Total	$1,287.6	$449.5	$1,393.3	$466.6	$1,500.9	$502.8	$1,622.1	$687.7
18		G & A Overheads 3.9% 3.6%	51.4	15.9	55.6	16.8	59.9	18.1	64.7	24.8
19		Total	$1,339.0	$465.0	$1,448.9	$483.4	$1,560.8	$520.9	$1,686.8	$712.5
20		Interest During Construction at 12%	160.7	53.4	173.9	58.0	187.3	62.5	202.4	85.5
21		Total	$1,499.7	$498.4	$1,622.8	$541.4	$1,748.1	$583.4	$1,889.2	$798.0

SCHEDULE 6
Page 6 of 10

		1977	1978	1979	1980
22	Cost of Reproduction New: Pipe and Fittings	$1,249.0	$1,351.5	$1,455.9	$1,573.5
23	Buildings and Machinery	432.5	448.1	482.9	660.5
24	Overheads Capitalized	336.6	364.6	350.7	453.2
25	Total (To p. 1, line 2)	$2,018.1	$2,364.2	$2,331.5	$2,687.2

Protest Reply of ARCO Pipe Line.

ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

SUMMARY OF CONSTRUCTION EXPENDITURES AT 1967 PRICES

1977-1981

(Dollars in Millions)

SCHEDULE 6
Page 9 of 10

Line No.	Account No.	Description	(Col. 1) 1969	(Col. 2) 1970	(Col. 3) 1971	(Col. 4) Initial Construction 1972	(Col. 5) 1973	(Col. 6) 1974	(Col. 7) 1975	(Col. 8) 1976	(Col. 9) 1977	(Col. 10) Total	(Col. 11) ARCO's Pro	(Col. 12) 1978 Expansion 1978	(Col. 13) 1979	(Col. 14) 1980	(Col. 15) ARCO's Total as 12/31/80
1	153	Line Pipe							$ 17.0	$ 14.0							
2		Original Cost	$ 34.0	$ 42.0	$ 28.0				499	423							
3		Annual Index	393	390	313				$ 4.16	$ 3.31		$ 68.54	$ 34.44				$ 34.44
4		1967 Cost	$ 7.29	$ 13.00	$ 13.02												
5	154	Line Pipe Fittings															
6		Original Cost			$ 3.0			$ 4.0	$ 11.0	$ 18.0							
7		Annual Index			313			390	499	423							
8		1967 Cost			$ 1.48			$ 1.54	$ 3.67	$ 9.46		$ 19.89	$ 3.33				$ 3.33
9	155	Pipeline Construction															
10		Original Cost	$ 12.0	$ 78.0	$ 48.0	$ 59.0	$ 11.0	$683.9	$2,110.6	$1,357.4	$776.1						
11		Annual Index	169	176	191	264	419	312	349	284	307						
12		1967 Cost	$ 7.10	$ 44.32	$ 25.13	$ 9.35	$ 5.02	$282.33	$ 761.41	$ 601.72	$ 349.00	$1,949.73	$499.44				$499.44
13	156	Buildings															
14		Original Cost	$ 2.0	$ 2.0	$ 1.0		$ 2.0	$ 17.7	$ 102.6	$ 150.6	$ 12.6						
15		Annual Index	259	293	196		324	265	273	284	307						
16		1967 Cost	$ 1.39	$ 1.33	$ 0.51		$ 0.49	$ 10.00	$ 37.58	$ 53.03	$ 13.68	$ 122.39	$ 26.58				$ 26.58
17	157	Boilers															
18		Original Cost						$ 1.0	$ 7.4	$ 8.8	$ 3.1						
19		Annual Index						300	330	360	367						
20		1967 Cost						$ 0.33	$ 2.24	$ 2.39	$ 0.84	$ 6.00	$ 1.26				$ 1.26
21	158	Pumping Equipment															
22		Original Cost						$ 6.0	$ 29.0	$ 33.0	$ 2.0			$ 48.0	$ 62.6	$ 25.9	
23		Annual Index						249	345	384	415			448	484	523	
24		1967 Cost						$ 2.11	$ 6.41	$ 6.59	$ 0.48	$ 19.59	$ 4.11	$ 10.71	$ 12.93	$ 4.99	$ 30.93
25	160	Other Station Equipment															
26		Original Cost			$ 9.0	$ 2.0	$ 7.0	$ 28.2	$ 145.7	$ 273.4	$317.3						
27		Annual Index			249	290	293	300	273	309	439						
28		1967 Cost			$ 3.61	$ 1.03	$ 0.37	$ 9.10	$ 29.06	$ 64.07	$ 72.01	$ 196.35	$ 41.19				$ 41.19
29	161	Oil Tanks															
30		Original Cost				C 1.0	$ 1.0	$ 23.1	$ 123.3	$ 173.9	$ 92.0						
31		Annual Index				293	300	303	410	439	470						
32		1967 Cost				$ 0.56	$ 0.33	$ 6.48	$ 20.07	$ 39.58	$ 19.57	$ 86.49	$ 20.30				$ 20.30
33	162	Delivery Facilities															
34		Original Cost				$ 1.0	$ 1.0	$ 8.2	$ 66.4	$ 114.9	$ 60.7						
35		Annual Index				236	248	290	330	353	380						
36		1967 Cost				$ 0.42	$ 0.40	$ 2.66	$ 19.76	$ 30.44	$ 15.97	$ 69.65	$ 15.13				$ 15.13
37	163	Communication System															
38		Original Cost									$ 3.0						
39		Annual Index									284						
40		1967 Cost									$ 1.06	$ 1.06	$ 0.22				$ 0.22
41	164	Office Furniture & Fixtures															
42		Original Cost									$ 1.0						
43		Annual Index									259						
44		1967 Cost									$ 0.39	$ 0.39	$ 0.08				$ 0.08
45	165	Vehicles & Other Work Equipment															
46		Original Cost									$ 50.0						
47		Annual Index									284						
48		1967 Cost									$ 17.61	$ 17.61	$ 3.70				$ 3.70

SCHEDULE 6
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ARCO PIPE LINE COMPANY

TRANS ALASKA PIPELINE SYSTEM

SCHEDULE OF ANNUAL AND PERIOD INDICES

Line No.	Account No.	Description	(Col. 1) 1969	(Col. 2) 1970	(Col. 3) 1971	(Col. 4) 1972	(Col. 5) 1973	(Col. 6) 1974	(Col. 7) 1975	(Col. 8) 1976	(Col. 9) 1977	(Col. 10) 1978	(Col. 11) 1979	(Col. 12) 1980	(Col. 13) 1981
1	153	Line Pipe Annual Indices	193	200	215	219	235	299	409	423	457	494	536	577	622
2		Period Indices (A)									416	463	497	537	
3	154	Line Pipe Fittings Annual Indices	193	200	215	219	235	299	409	423	457	494	536	577	622
4		Period Indices (A)									416	463	497	537	
5	155	Pipeline Construction Annual Indices	165	176	191	204	219	242	269	284	307	332	359	388	418
6		Period Indices (A)									287	310	334	361	
7	156	Buildings Annual Indices	219	225	196	206	224	265	273	284	307	332	359	388	418
8		Period Indices (A)									292	311	334	361	
9	157	Boilers Annual Indices	200	203	221	232	250	300	330	340	367	396	428	462	498
10		Period Indices (A)									347	372	399	430	
11	158	Pumping Equipment Annual Indices	226	230	236	244	253	285	325	364	419	448	484	523	564
12		Period Indices (A)									375	415	451	487	
13	160	Other Station Equipment Annual Indices	233	241	249	259	273	310	373	397	429	463	500	540	582
14		Period Indices (A)									394	432	466	503	
15	161	Oil Tanks Annual Indices	229	253	274	293	300	361	410	429	470	508	549	593	639
16		Period Indices (A)									437	474	511	552	
17	162	Delivery Facilities Annual Indices	210	223	225	236	248	290	336	352	380	410	443	478	515
18		Period Indices (A)									354	384	413	445	
19	163	Communications Systems Annual Indices	187	192	198	204	213	233	249	263	284	307	332	359	387
20		Period Indices (A)									267	287	309	334	
21	164	Office Furniture & Fixtures Annual Indices	169	172	177	179	188	207	236	240	259	280	302	326	351
22		Period Indices (A)									244	263	281	304	
23	165	Vehicles & Other Work Equip. Annual Indices	171	179	186	191	196	218	250	263	284	307	332	359	387
24		Period Indices (A)									263	287	309	334	

(A) Period Indices are computed by averaging 3 prior years', the current year's and 1 future year's Annual Indices.

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Protest Reply of ARCO Pipe Line.

Protest Reply of ARCO Pipe Line.

[Omitted (reproduced in Volume 3)]

BEFORE THE
INTERSTATE COMMERCE COMMISSION
DOCKET NO. 36611
TRANS ALASKA PIPELINE SYSTEM

VERIFIED STATEMENT OF JOHN A. JETER
REGARDING TREATMENT OF INTEREST
AS AN OPERATING EXPENSE

My name is John A. Jeter. I am a certified public accountant and, since 1954, have been associated with Arthur Andersen & Co., a firm of independent public accountants. I am presently a partner in that firm and am in charge of the firm's audit practice in Omaha, Nebraska.

At the request of counsel for ARCO Pipe Line Company, I undertook to analyze the data accompanying the letters of November 10, 1975, and March 22, 1976, from George M. Stafford, then Chairman of the Interstate Commerce Commission ("ICC" or "Commission"), to William L. Hungate, Chairman of the Subcommittee on Activities of Regulatory Agencies of the House Committee on Small Business (the letters and accompanying data, hereinafter collectively referred to as the "Stafford letters," appear at Appendix B). All work and calculations described in this statement were performed by me or by persons working at my direction.

From the list of pipeline companies for whom data is set forth in the Stafford letters, the five owner companies or affiliates of owners of the Trans Alaska Pipeline System listed therein, and 13 other major pipeline companies, were selected for analysis. Copies of Schedule 302 of the Annual Reports, Form P, for the years 1970-1973, inclusive, were then obtained from the ICC files for each of the 18 companies selected, except in three cases where the records custodian was unable to locate the Annual Reports. The dollar amounts provided at lines 5 and 10 of Schedule 302

(shown as "Net carrier operating income" and "Interest expense," respectively) were then used on Schedule A, attached hereto.

Using the data obtained from the Annual Reports, computations of net income (or loss) were made with interest treated as an operating expense. These figures, which appear in Column 5 of Schedule A, were then compared with the corresponding "Net Income (or loss)" figures shown in the Stafford letters (the figures from the Stafford letters are reproduced in Column 6 of Schedule A). In all 68 cases, the computed amounts agree with the "Net Income (or loss)" figures from the Stafford letters.

It is evident from this analysis that, in the Stafford letters, interest was treated as an operating expense in computing income or loss and rates of return on valuation.

SCHEDULE A
Page 1 of 4

RATE OF RETURN ON VALUATION

SELECTED OIL PIPE LINE COMPANIES

1972

Company	(Col. 1) Form P Schedule 302 Line 9 Net Carrier Operating Income	(Col. 2) Form P Schedule 302 Line 10 Interest Expense	(Col. 3) Total (Col. 1 - Col. 2)	(Col. 4) Income Tax (Col. 3 x 48.0%)	(Col. 5) Net Income (or Loss) (Col. 3 - Col. 4)	(Col. 6) ICC Letter to Congress (Note 1)
Amoco Pipeline Company	$31,401	$ 812	$30,589	$14,683	$15,906	$15,906
ARCO Pipe Line Company	11,983	570	11,410	5,477	5,933	5,933
Cities Service Pipe Line Company	2,729	79	2,650	1,272	1,378	1,378
Colonial Pipeline Company	51,616	16,329	35,287	16,938	18,349	18,349
Dixie Pipeline Company	6,383	1,844	4,536	2,177	2,359	2,359
Exxon Pipeline Company (Note 2)	31,996	5,101	26,895	12,910	13,985	13,985
Gulf Refining Company	9,148	-	9,148	4,391	4,757	4,757
Laurel Pipe Line Company	3,497	1,543	1,954	938	1,016	1,016
Mobil Pipe Line Company	18,546	5,064	13,482	6,471	7,011	7,011
Phillips Pipe Line Company	12,339	118	12,221	5,866	6,355	6,355
Platte Pipe Line Company	6,929	993	5,934	2,848	3,086	3,086
Pure Transportation Company	5,542	1,223	4,319	2,073	2,246	2,246
Shell Pipe Line Corp.	21,573	4,506	17,067	8,192	8,875	8,875
Sohio Pipe Line Company	1,470	-	1,470	706	764	764
Sun Pipe Line Company	4,672	599	4,273	2,051	2,222	2,222
Texas Pipe Line Company	21,043	4,223	16,818	8,073	8,745	8,745
Texas - New Mexico Pipe Line	6,431	647	5,784	2,776	3,008	3,008
Williams Pipe Line Company (Note 3)	N/A	N/A				7,099

Notes:

(1) Letter dated November 10, 1975, from Mr. George M. Stafford, Chairman, Interstate Commerce Commission to Mr. William L. Hungate, Chairman, Subcommittee on Activities of Regulatory Agencies, Committee on Small Business, House of Representatives.

(2) Name changed from Humble Pipe Line Company to Exxon Pipeline Company January 1, 1973.

(3) Name changed from Williams Brothers Pipe Line Company.

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SCHEDULE A
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RATE OF RETURN ON VALUATION

SELECTED OIL PIPE LINE COMPANIES

1971

Company	(Col. 1) Form P Schedule 302 Line 9 Net Carrier Operating Income	(Col. 2) Form P Schedule 302 Line 10 Interest Expense	(Col. 3) Total (Col. 1 - Col. 2)	(Col. 4) Income Tax (Col. 3 x 48.0%)	(Col. 5) Net Income (or Loss) (Col. 3 - Col. 4)	(Col. 6) ICC Letter to Congress (Note 1)
Amoco Pipeline Company	$32,126	$ 837	$31,289	$15,019	$16,270	$16,270
ARCO Pipe Line Company	13,977	454	13,523	6,491	7,032	7,032
Cities Service Pipe Line Company	3,126	76	3,050	1,464	1,586	1,586
Colonial Pipeline Company	52,648	17,456	35,191	16,891	18,300	18,300
Dixie Pipeline Company	6,810	1,873	4,937	2,370	2,567	2,567
Exxon Pipeline Company (Note 2)	29,033	5,653	23,380	11,222	12,158	12,158
Gulf Refining Company	8,830	844	7,986	3,833	4,153	4,153
Laurel Pipe Line Company	2,758	1,442	1,316	632	684	684
Mobil Pipe Line Company	19,951	5,118	14,833	7,120	7,713	7,713
Phillips Pipe Line Company	11,829	109	11,720	5,626	6,094	N/A
Platte Pipe Line Company	6,052	808	5,244	2,517	2,727	2,727
Pure Transportation Company	N/A	N/A				2,990
Shell Pipe Line Corp.	22,258	4,764	17,494	8,397	9,097	9,097
Sohio Pipe Line Company	2,158	-	2,158	1,036	1,122	1,122
Sun Pipe Line Company	7,058	360	6,698	3,215	3,483	3,483
Texas Pipe Line Company	19,655	2,324	17,331	8,319	9,012	9,012
Texas - New Mexico Pipe Line	5,681	649	5,032	2,415	2,617	2,617
Williams Pipe Line Company (Note 3)	26,761	13,315	13,446	6,454	6,992	6,992

Notes:

(1) Letter dated November 10, 1975, from Mr. George M. Stafford, Chairman, Interstate Commerce Commission to Mr. William L. Hungate, Chairman, Subcommittee on Activities of Regulatory Agencies, Committee on Small Business, House of Representatives.

(2) Name changed from Humble Pipe Line Company to Exxon Pipeline Company January 1, 1973.

(3) Name changed from Williams Brothers Pipe Line Company.

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RATE OF RETURN ON VALUATION

SELECTED OIL PIPE LINE COMPANIES

1972

Company	(Col. 1) Form P Schedule 302 Line 5 Net Carrier Operating Income	(Col. 2) Form P Schedule 302 Line 10 Interest Expense	(Col. 3) Total (Col. 1 - Col. 2)	(Col. 4) Income Tax (Col. 3 x 48.0%)	(Col. 5) Net Income (or Loss) (Col. 3 - Col. 4)	(Col. 6) ICC Letter to Congress (Note 1)
Amoco Pipeline Company	$32,377	$ 2,552	$29,825	$14,316	$15,509	$15,509
ARCO Pipe Line Company	11,676	338	11,338	5,442	5,896	5,896
Cities Service Pipe Line Company	2,889	90	2,799	1,344	1,455	1,455
Colonial Pipeline Company	57,920	24,427	33,493	16,077	17,416	17,416
Dixie Pipeline Company	7,908	1,994	5,914	2,839	3,075	3,075
Exxon Pipeline Company (Note 2)	34,217	5,747	28,470	13,666	14,804	14,804
Gulf Refining Company	10,574	4	10,570	5,074	5,496	5,496
Laurel Pipe Line Company	1,856	1,341	515	247	268	268
Mobil Pipe Line Company	18,133	4,844	13,289	6,379	6,910	6,910
Phillips Pipe Line Company	11,773	106	11,667	5,600	6,067	6,067
Platte Pipe Line Company	6,060	752	5,308	2,548	2,760	2,760
Pure Transportation Company	6,991	1,125	5,866	2,816	3,050	3,050
Shell Pipe Line Corp.	23,019	7,098	15,921	7,642	8,279	8,279
Sohio Pipe Line Company	2,602	-	2,602	1,249	1,353	1,353
Sun Pipe Line Company	9,057	561	8,496	4,078	4,418	4,418
Texas Pipe Line Company	14,793	2,265	12,528	6,013	6,515	6,515
Texas - New Mexico Pipe Line	5,828	572	5,256	2,523	2,733	2,733
Williams Pipe Line Company (Note 3)	27,769	12,716	15,053	7,225	7,828	7,828

Notes:

(1) Letter dated November 10, 1975, from Mr. George M. Stafford, Chairman, Interstate Commerce Commission to Mr. William L. Hungate, Chairman, Subcommittee on Activities of Regulatory Agencies, Committee on Small Business, House of Representatives.

(2) Name changed from Humble Pipe Line Company to Exxon Pipeline Company January 1, 1973.

(3) Name changed from Williams Brothers Pipe Line Company.

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RATE OF RETURN ON VALUATION

SELECTED OIL PIPE LINE COMPANIES

1973

Company	(Col. 1) Form P Schedule 302 Line 5 Net Carrier Operating Income	(Col. 2) Form P Schedule 302 Line 10 Interest Expense	(Col. 3) Total (Col. 1 - Col. 2)	(Col. 4) Income Tax (Col. 3 x 48.0%)	(Col. 5) Net Income (or Loss) (Col. 3 - Col. 4)	(Col. 6) ICC Letter to Congress (Note 1)
Amoco Pipeline Company	$32,800	$ 2,811	$29,989	$14,395	$15,594	$15,594
ARCO Pipe Line Company	13,198	222	12,976	6,228	6,748	6,748
Cities Service Pipe Line Company	3,364	319	3,045	1,462	1,583	1,583
Colonial Pipeline Company	60,965	24,559	36,406	17,475	18,931	18,931
Dixie Pipeline Company	6,299	2,009	4,290	2,059	2,231	2,231
Exxon Pipeline Company (Note 2)	38,035	7,361	3,0674	14,724	15,950	15,950
Gulf Refining Company	11,176	1	11,175	5,364	5,811	5,811
Laurel Pipe Line Company	2,746	1,240	1,506	723	783	783
Mobil Pipe Line Company	18,946	5,461	13,485	6,473	7,012	7,012
Phillips Pipe Line Company	10,928	99	10,829	5,198	5,631	5,631
Platte Pipe Line Company	7,347	781	6,566	3,169	3,414	3,414
Pure Transportation Company	N/A	N/A				2,680
Shell Pipe Line Corp.	23,190	7,137	16,053	7,705	8,348	8,348
Sohio Pipe Line Company	2,410	-	2,410	1,157	1,253	1,253
Sun Pipe Line Company	8,912	169	8,743	4,197	4,546	4,546
Texas Pipe Line Company	17,085	3,653	13,432	6,447	6,985	6,985
Texas - New Mexico Pipe Line	6,119	556	5,563	2,670	2,893	2,893
Williams Pipe Line Company (Note 3)	28,658	12,117	16,541	7,940	8,601	8,601

Notes:

(1) Letter dated November 10, 1975, from Mr. George M. Stafford, Chairman, Interstate Commerce Commission to Mr. William L. Hungate, Chairman, Subcommittee on Activities of Regulatory Agencies, Committee on Small Business, House of Representatives.

(2) Name changed from Humble Pipe Line Company to Exxon Pipeline Company January 1, 1973.

(3) Name changed from Williams Brothers Pipe Line Company.

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Protest Reply of ARCO Pipe Line.

VERIFICATION

District of Columbia } ss:

John A. Jeter, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

JOHN A. JETER

Subscribed and sworn to before me
this 22nd day of June, 1977.

SHIRLEY C. PURVIS
Notary Public
of the District of Columbia

My commission expires: April 14, 1980

Protest Reply of ARCO Pipe Line.

BEFORE THE
INTERSTATE COMMERCE COMMISSION
DOCKET NO. 36611
TRANS ALASKA PIPELINE SYSTEM

VERIFIED STATEMENT OF ROBERT L. HUSTON

My name is Robert L. Huston. I am Senior Vice President of White, Weld & Co. Incorporated ("White, Weld"). White, Weld is an international investment banking firm with offices throughout the United States and in major cities abroad. Our clients include corporations from all sectors of industry, and our staff of corporate finance specialists working with these clients exceeds seventy in number. My personal background includes twenty-one years in oil, gas and minerals financing. Project financing in which I have been deeply involved covers uranium, coal, shipping, refineries and pipelines, as well as oil and gas production financing.

Matters Reviewed

At the request of counsel for ARCO Pipe Line Company ("ARCO Pipe Line"), we have set forth briefly in the following pages the views of White, Weld with respect to (i) the rate of return which, under the proposed $6.04 per barrel tariff, ARCO Pipe Line may expect to earn on its investment in the Trans Alaska Pipeline System ("TAPS" or the "System"), and (ii) the reasonableness of such a return. In conducting our analysis and arriving at our conclusions, we have relied upon a number of factors, including:

(1) An understanding of the valuation and rate of return methodology employed by the Interstate Commerce Commission;

(2) A review of the documents submitted to date by the various protestants;

(3) The financing of ARCO Pipe Line's undivided interest ownership in TAPS and its relationship to the overall capital structure of Atlantic Richfield;

(4) The accumulated experience of White, Weld with respect to the underwriting and marketing of securities in capital markets around the world;

(5) The rate of return calculations provided for ARCO Pipe Line by John A. Jeter of Arthur Andersen & Co. (Appendix F); and

(6) Returns on equity which have been earned by companies in capital-intensive industries (see Exhibit 1 hereto).

Discussion

Papers filed to date in protest of the proposed ARCO Pipe Line tariff have suggested, among other things, that approval of such a tariff would permit an excessive rate of return on equity, asserted by one protestant, the State of Alaska, to be 66.0%. Aside from the obvious fact that ICC methodology does not address the issue of return on equity, we believe that the protestants have based their conclusions on several mistaken assumptions which distort the financial realities of TAPS. Among these unstated assumptions, the most important are the following:

(1) That TAPS was essentially a project financing, whereby the underlying economics of the System alone permitted the pipeline companies involved to finance their respective investments through the issuance of a high percentage of debt;

(2) That the employment of debt financing for ARCO Pipe Line had no relation to Atlantic Richfield's ability to undertake other projects; and

(3) That ARCO Pipe Line's rate of return calculation is unrelated to the debt and equity capitalization of Atlantic Richfield.

We believe that refutation of these assumptions is a necessary prerequisite to a fair evaluation of the appropriateness of the proposed tariff:

(A) Project financing, in terms of ARCO Pipe Line's share of TAPS, would have involved ARCO Pipe Line financing its portion of TAPS costs based on the economic merits of the project alone. The risks involved in TAPS exceeded those in normal project financings, especially in regard to the lack of producing history to substantiate the oil reserve estimates, unknown future wellhead pricing, and uncertain construction costs and costs of production. Because of the risks involved, it would not have been possible for ARCO Pipe Line to raise the necessary capital based solely on its own credit and its future cash flow. In order to finance its capital cost of the System, ARCO Pipe Line had to rely on the credit standing of Atlantic Richfield. The fact that ARCO Pipe Line issued debt guaranteed by Atlantic Richfield to finance its participation in TAPS emphasizes the necessity of viewing the issue of a reasonable return on equity in the context of the consolidated capital structure of Atlantic Richfield.

(B) The assumption that TAPS was project financed and could, by definition, support a high level of debt on the basis of the economics of the System ignores any consideration of the opportunity cost to Atlantic Richfield of participating in the financing of TAPS. In the overall context of the business of Atlantic Richfield and its subsidiaries, TAPS repre-

sents only one among numerous actual or potential projects. The fact is that the debt of ARCO Pipe Line was only marketable with an Atlantic Richfield guarantee. If ARCO Pipe Line's cash flow is insufficient to meet its debt maturities, Atlantic Richfield is required to make the payments from its own funds. This fact is considered by the rating agencies and the financial community in their evaluation of Atlantic Richfield's creditworthiness when it seeks debt funds for other projects.

(C) Typically, the purchasers of corporate debt securities are insurance companies, pension funds, savings banks and the public. In making their investment decision, these investors rely on several measures of credit standing. One measure is the percentage of balance sheet term debt in a company's total debt and equity capitalization. Another measure is the ratio of a company's pre-tax earnings to its fixed annual charges, primarily interest on its debt. The percentage of debt in the total capitalization of ARCO Pipe Line as of December 31, 1976, and its coverage of fixed charges as of that date, were 89% and 0.26, respectively. Given the prospect of this high debt ratio and of the unusually low coverage of fixed charges, and the attendant risks associated with TAPS, it is our judgment that investors would not have considered the purchase of ARCO Pipe Line's debt issue without either a direct guarantee from Atlantic Richfield Company or other assurances of debt repayment, such as might be provided for in the form of throughput agreements. In point of fact, Atlantic Richfield's equity position and earnings power were unequivocally the keys to ARCO Pipe Line's ability to invest in TAPS. To calculate, as do protestants, an earnings return on

ARCO Pipe Line's book figures, which in turn depend on the resources of Atlantic Richfield, is an exercise which lacks significance.

Conclusion

It is sufficiently clear to us, as financial advisors, that to measure the return on equity without reference to the capital structure of Atlantic Richfield is a distortion of financial reality. The TAPS project risks were such that it was necessary for Atlantic Richfield to guarantee the debt of ARCO Pipe Line. The guarantee provided marketability to ARCO Pipe Line's debt, but Atlantic Richfield's ability to issue additional debt for other projects was reduced by the guarantee. The credit standing of the parent company, its earning power, and particularly its capital account, were the cornerstones for ARCO Pipe Line's financing. The capital ratio of Atlantic Richfield is the appropriate framework for the earnings measurement of ARCO Pipe Line.

It is quite evident that after adjusting the capitalization of ARCO Pipe Line to reflect the ratio of debt to total capital of Atlantic Richfield, the return on equity is consistent with the rate of return on equity forecast for new projects being undertaken by capital-intensive corporations. Generally speaking, for a new investment a company seeks an after-tax earnings return on equity in excess of its current rate of return, since to invest at a lower return will adversely affect earnings growth over a period of time. For purposes of comparison, we have attached as Exhibit I a summary of the returns on book equity earned in 1976 by companies in capital-intensive industries.

The $6.04 tariff will provide for an average return on book equity of 15.2% through 1981 (see Appendix F). In the judgment of White, Weld, this return is modest in view of the risks of the TAPS project.

Protest Reply of ARCO Pipe Line.

EXHIBIT 1

1976 Return on Stockholders' Equity for Companies Engaged in the Manufacture of Chemicals
($ in Thousands)

	Net Income	Stockholders' Equity	Return on Stockholders' Equity
Nalco Chemical	$ 43,364	$ 183,251	23.77%
International Minerals & Chemicals	135,400	580,700	23.32
Dow Corning	42,741	197,412	21.65
Dow Chemical	612,767	2,865,010	21.39
Diamond Shamrock	140,030	671,642	20.85
Lubrizol	50,957	261,633	19.48
Stauffer Chemical	113,016	597,043	18.93
Clorox	27,262	151,034	18.05
Air Products & Chemicals	63,479	362,813	17.50
Kewanee Industries	35,398	213,019	16.62
National Starch & Chemical	24,486	149,259	16.41
Monsanto	366,300	2,252,300	16.26
Koppers	66,841	424,419	15.75
Insilco	19,616	129,984	15.21
PPG Industries	151,500	1,021,600	14.83
Ethyl	69,080	475,884	14.52
Airco	54,003	372,458	14.50
Union Carbide	441,200	3,055,100	14.44
Hercules	106,801	742,020	14.39
Witco Chemical	23,062	162,801	14.17
Ferro	20,054	143,960	13.93
National Distillers & Chemical	90,288	672,976	13.42
Inmont	20,108	163,387	12.31
Am[illegible]n Cyanamid	135,766	1,109,169	12.24
[illegible]nwalt	34,910	285,780	12.22
Olin	72,563	594,387	12.21
W.R. Grace	131,882	1,155,342	11.41
DuPont	459,300	4,039,200	11.37
Cabot	29,373	264,637	11.10
Reichhold Chemicals	16,085	149,196	10.78
NL Industries	58,836	553,754	10.62
Allied Chemical	116,799	1,114,288	10.48
SCM	30,395	313,643	9.69
Williams Companies	61,196	676,634	9.04
Celanese	69,000	796,000	8.67
Chemetron	13,400	212,000	6.32
Sherwin-Williams	18,435	302,066	6.10
Akzona	5,622	306,594	1.83
Rohm & Haas	(11,777)	501,223	(2.35)
Morton-Norwich Products	(6,639)	219,837	(3.03)
AVERAGE	$ 98,827	$ 711,067	13.90%

Protest Reply of ARCO Pipe Line.

1976 Return on Stockholders' Equity for Companies Engaged in Mining and Crude Oil Production
($ in Thousands)

	Net Income	Stockholders' Equity	Return on Stockholders' Equity
MAPCO	$ 56,126	$ 203,033	27.64%
Westmoreland Coal	48,232	189,679	25.43
Louisiana Land & Exploration	96,744	397,589	24.33
Pittston	146,372	602,887	24.28
Pennzoil	167,659	704,798	23.79
Natomas	57,112	270,270	21.13
Eastern Gas & Fuel Associates	65,731	337,926	19.45
Vulcan Materials	37,247	201,176	18.51
St. Joe Minerals	68,748	415,773	16.53
Hanna Mining	53,757	340,635	15.78
Belco Petroleum	31,355	199,222	15.74
Occidental Petroleum	183,721	1,305,276	14.08
Getty Oil	258,475	2,157,224	11.98
AMAX	150,080	1,566,050	9.58
Texasgulf	62,914	795,393	7.91
Peabody Coal	30,815	928,456	3.32
AVERAGE	$ 94,693	$ 663,462	14.27%

Protest Reply of ARCO Pipe Line.

1976 Return on Stockholders' Equity for Companies Engaged in Petroleum Refining
($ in Thousands)

	Net Income	Stockholders' Equity	Return on Stockholders' Equity
Continental Oil	$ 459,994	$ 2,635,444	17.45%
Marathon Oil	195,808	1,150,527	17.02
Ashland Oil	135,983	808,973	16.81
Shell Oil	705,838	4,591,182	15.37
Phillips Petroleum	411,656	2,720,341	15.13
Kerr-McGee	134,132	913,104	14.69
Crown Central Petroleum	12,092	82,706	14.62
Standard Oil (Indiana)	892,968	6,146,705	14.53
Tenneco	383,500	2,651,000	14.47
Exxon	2,640,964	18,470,352	14.30
Atlantic Richfield	575,178	4,091,133	14.06
Quaker State Oil Refining	25,748	184,735	13.94
Sun	356,182	2,555,069	13.94
Amerada Hess	152,637	1,161,843	13.14
Murphy Oil	48,903	379,531	12.89
Union Oil	268,815	2,103,815	12.78
Standard Oil of California	880,127	7,007,013	12.56
Mobil	942,523	7,651,811	12.32
Cities Service	217,000	1,798,200	12.07
American Petrofina	45,549	387,053	11.77
Gulf Oil	816,000	6,942,000	11.75
Tosco	7,959	67,862	11.73
Charter	16,862	146,409	11.52
Texaco	869,731	9,002,007	9.66
Clark Oil & Refining	9,439	106,393	8.87
Standard Oil (Ohio)	136,857	1,549,302	8.83
Tesoro Petroleum	28,799	359,232	8.02
Commonwealth Oil Refining	(32,085)	145,482	(22.05)
AVERAGE	$ 404,970	$ 3,064,615	13.21%

Protest Reply of ARCO Pipe Line.

VERIFICATION

District of Columbia) ss:

Robert L. Huston, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

ROBERT L. HUSTON

Subscribed and sworn to before me
this 22nd day of June, 1977.

SHIRLEY C. PURVIS

Notary Public
of the District of Columbia

My commission expires: April 14, 1980

Protest Reply of ARCO Pipe Line.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. 36611
TRANS ALASKA PIPELINE SYSTEM

COMMENTS ON PETITIONS SEEKING SUSPENSION OF INITIAL RATES FOR TRANSPORTATION OF PETROLEUM VIA TRANS ALASKA PIPELINE SYSTEM

Verified Statement of
J. Rhoads Foster

Foster Associates, Inc.
Washington, D.C. 20036
June 22, 1977

Protest Reply of ARCO Pipe Line.

My name is J. Rhoads Foster. My address is 1101 Seventeenth Street, Northwest, Washington, D.C. 20036. I am an economist and a senior consultant with Foster Associates, Inc., an independent consulting firm of which I am the founder.

Foster Associates offers economic research and consulting services to governmental agencies, industry groups, and individual companies in the United States and Canada. The principal areas of consulting activity include energy, public utilities, transportation, communications, the securities business and the postal service. Assignments within these areas of activity involve many issues and problems, including supply of and demand for products or services, pricing, methods of governmental regulation, proposed legislation, cost of capital, fair rate of return, financial feasibility, cost analysis, valuation of property and industry structure.

I received a doctorate in political economy from the University of Missouri in 1933 and was first employed (1933-1936) by Consolidated Edison Company (then New York Edison Company) as Special Assistant to the Rate Engineer. From 1937 to 1942 I was Economist and Director of Special Investigations, Board of Public Utility Commissioners, State of New Jersey. On leave of absence, in 1937-1938, I was employed by the Federal Communications Commission to make cost of capital and fair rate of return studies in connection with the Commission's first general investigation of the Bell System. I taught courses in public utility economics, ratemaking, principles of valuation, regulatory procedures and public utility law in the Graduate School of Business Administration and the School of Law, New York University, on a part-time basis (1937-1952). I am co-author of Foster and Rodey, *Public Utility Accounting* (Prentice-Hall, 1951) and of many articles and mono-

graphs. I have been a member of the New York Society of Security Analysts for about 40 years and am a past Chairman of the Committee on Corporate Finance, National Association of Railroad and Utilities Commissioners.

My employment to make cost of capital and fair rate of return studies has been continuous since 1937, with assignments from governmental agencies, trade associations and companies in nonregulated as well as regulated industries. I have made cost of capital studies for gas transmission companies, gas distributors, combination electric and gas companies, electric companies, telephone companies, airline companies, shipping companies, railroads, oil pipeline companies and local transportation companies. I have made submissions to legislative and judicial bodies and, on one or many occasions, to more than 35 regulatory agencies in the United States and Canada. My submissions to the Interstate Commerce Commission on cost of capital and fair rate of return issues have been on behalf of the Association of American Railroads in *Ex Parte Nos.* 271, 274 (Sub-No. 2) and 338 and, on behalf of Burlington-Northern and Southern Pacific, in Docket No. 36,180.

The United States Department of Justice, the Bureau of Investigations and Enforcement (Interstate Commerce Commission), the State of Alaska and the Arctic Slope Regional Corporation directed protests at the initial tariff rates filed for the transportation of liquid hydrocarbons by carriers holding an ownership interest in the Trans-Alaska Pipeline System (TAPS). Each of the protestants requests the Commission to suspend the published tariffs and permit the carriers to file, on short notice, revised tariffs which would establish the transportation rates at

levels consistent with rates asserted by the protestants to be reasonable.

Rates proposed by the Department of Justice vary from $3.74 to $4.88 per barrel. The variance is with equity ratios attributed to the individual carriers and with other cost differences. The proposed rates are substantially below rates in the range of $6.04 to $6.44 filed by the carriers. Rates deemed proper by the Bureau of Investigations and Enforcement vary from $4.54 to $5, while the State of Alaska proposes maximum interim rates in the $3.59 to $4.42 range. Requests are that refilings be subject to refund provisions and a continuing investigation into the reasonableness of the proposed rates. For example, the Department of Justice requests the Commission "to institute an investigation into the lawfulness of such rates, such investigation to include an analysis of ratemaking methodology, allowed rate of return, and reasonableness of costs incurred or claimed."

ARCO Pipe Line Company has asked me to review the submissions made by each of the protestants and to determine whether or not, in my opinion, the rates filed by the protestants are *prima facie* reasonable and whether or not the rate filed by the carrier is, as contended by the protestants, clearly excessive, unjust and unreasonable.

My analysis is directed to the cost of capital component of the total cost of transportation. I have made no study and have no opinion regarding other cost components of the tariff rates. Moreover, this submission is limited to a preliminary analysis of available information. I do not reach an opinion regarding the cost of capital and return which may be finally determined to be just and reasonable. For the purpose of the analyses set out in this submission I accept the factual data as distinguished from judgments or conclusions contained in the petitions and complaints.

I did not advise ARCO Pipe Line or other carriers as to what should be the cost of capital component of proposed tariff rates.

The protestants have identified a wide range of complex issues, including cost of capital and reasonable equity earnings, costs of construction and design of TAPS, interests charges during construction, annual depreciation and amortization charges, prospective removal costs and normalization versus flow through of deferred income taxes. The Bureau of Investigations and Enforcement lists still other issues which are now under active review by Touche Ross & Co. but on which Touche Ross has not yet reported. It appears evident that these issues cannot be resolved by informed decisions on the basis of summary hearings. Because of the issues presented with regard to standards and procedures for pipeline regulation, the generic hearing concept is relevant. I believe that reconsideration of regulatory standards and procedures for the pipeline industry is likely to be more productive if undertaken in a general hearing or investigation, such as *Ex Parte* No. 308, instead of in summary hearings. The Commission has adopted this hearing process in dealing with railroad industry problems arising under the 4 R's Act. Many other federal and state regulatory commissions have used this type of hearing process to establish policies and standards.[1]

The complexity of the issues is indicated by the errors of analysis and computation made by the Department of Justice and the State of Alaska.

1. For example, *Re Rate Design for Electric Corporations,* 15 PUR 4th, 434, 8-10-76 (New York Public Service Commission); *Re Adjustment Clauses in Telephone Rate Schedules,* 3 PUR 4th, 298, 12-13-73 (New Jersey Board of Public Utility Commissioners); *Accounting and Construction Work in Progress and Funds Used for Construction,* 9 PUR 4th, 394, 4-28-75 (Florida Public Service Commission).

The primary error lies in the assumption, contrary to fact, that with respect to financial risk and cost of debt and equity capital ARCO Pipe Line stands on its own feet independently of its parent, Atlantic Richfield.

The equity of ARCO Pipe Line is wholly-owned by Atlantic Richfield. The debt capital obtained by ARCO Pipe Line from external sources is unconditionally guaranteed by Atlantic Richfield as to payment of principal and interest. Neither the contractual cost of ARCO Pipe Line's long-term debt nor yields at market price measure what would have been, in the absence of the commitments by Atlantic Richfield, the cost of debt capital committed by ARCO Pipe Line to the construction of TAPS. A substantial portion of the cost of risk taking is borne by the owners of Atlantic Richfield. In other words, the credit of the owners and their debt capacity is transferred to ARCO Pipe Line. The guarantee is equivalent to a donation of equity capital. If the risks inherent in the pipeline venture had been borne directly by creditors and external suppliers of equity capital, the required equity capital would have been a large instead of a small share of the total capital. It is far from certain that such amounts of risk capital would have been available from private sources or that the pipeline could have been constructed on the basis of this mode of financing.

Because of the financial interdependence between ARCO Pipe Line and Atlantic Richfield, the cost of capital employed by ARCO Pipe Line in the TAPS venture is the composite cost of capital to the parent, subject to consideration of whatever may be the risk difference as between the transportation and other functional levels of the integrated operation. The cost of capital to Atlantic Richfield reflects the composite risk of all business activities in which it is engaged. It reflects all sources of risk present in the

physically and functionally integrated business. Investors in an integrated or diversified firm evaluate the composite investment risks associated with the company's stocks and bonds. Those evaluations determine the cost of capital to the firm.

These finance principles may be restated in a different context. The existing capital structure of ARCO Pipe Line reflects financial decisions by the management of Atlantic Richfield, not market appraisals of the risk characteristics of the TAPS venture. The extraordinary use of debt was made possible, not by relative absence of business risk, but by agreements which reduced the risk to bondholders of the pipeline subsidiary at the expense of the parent company's stockholders and bondholders. The financial risk to the owners of Atlantic Richfield is increased by granting the pipeline bondholders a prior claim on earnings. The capacity of Atlantic Richfield to finance other investments with debt capital was correspondingly reduced. Thus, because of the substantial financial interdependence, the opportunity cost of capital and reasonableness of an equity return, cannot be determined by reference to the capital structure of ARCO Pipe Line.

The degree to which these principles have been disregarded by the protestants is exemplified by the computations submitted by Dr. Ileo. He asserts that the purpose of his preliminary report "is to determine, given data which are currently available, tariffs for the pipeline services provided by the major owners of TAPS which will yield a fair return on each owner's equity investment in TAPS." In the case of ARCO Pipe Line, Dr. Ileo adopts 8.05 percent as the annual cost of long-term debt (78.85 percent of total capital), 4.59 percent for short-term debt (14.80 percent of total capital), and cost rates varying from 11 to 15 percent for common equity (9.35 percent of total capital). The

weighted cost of total capital, as thus calculated, varies from 7.82 to 8.19 percent depending upon the choice of equity cost rates.

These cost rates and returns on total capital, tentatively recommended by Dr. Ileo, are below the estimated 8.8 percent average cost of debt to the carriers.[1]

Similarly, the Department of Justice calculated per barrel rates ranging from $3.74 to $4.88, assuming equity ratios of 10, 15 and 20 percent, assuming a 14 percent return on these equity components of total capital and using interest and other costs reported by the carriers (pp. 3-5). A rate of return which might have a reasonable relationship with a broad equity should not be applied to an extraordinary thin equity of 10, 15 or 20 percent. In other words, the protestants made the false assumption that equity investment risk and cost of risk taking do not vary with capital structure leverage and make the results of the invalid calculations the basis of their assertions that the carriers would realize excessive profits. They have disregarded the financial risk normally associated with extraordinary capital structure leverage but borne by the parent in the case of ARCO Pipe Line.

Financial risk is the risk incurred by creditors, preferred stockholders, and common stockholders as the result of a decision by management to issue various types of securities to appeal to investors with different investment preferences. The total risk of the business is thus distributed unequally among the several classes of investors.

Risk to the creditor is always substantially less than risk to the owner of the company's common stock. It follows that the cost of debt capital is always much lower than the

1. Bureau of Investigations and Enforcement, page 20, fn. 29. Dr. Ileo assumes ARCO Pipe Line's annual cost rate for "long-term" debt to be 8.05 percent (Ileo, Schedule 7B), but the terms to maturity are much shorter than for bonds issued by other carriers.

prospective equity income needed to enable the company to sell common stock. Assuming other variables to be constant, higher yields are required by bondholders as the debt ratio rises, the proportion of gross income absorbed by debt requirements increases, and the margin of protection afforded bondholders is reduced. Security is afforded bondholders by the protective covenants of indentures, so that a portion of the business risks inherent in the employment of debt capital is shifted to the stockholders, who also demand higher returns as the debt ratio and the embedded cost rate rise. Since creditors have a prior claim on earnings and assets, the financial risk borne by equity owners increases as the equity ratio declines. They expect and require higher rates of earnings on equity capital as compensation for the greater financial risks associated with the leverage created by the use of senior capital. Therefore, the greater the amount of senior capital and the smaller the ratio of common stock to total capital, the higher the cost of common stock capital. Common stockholders may be willing to accept a larger chance of loss, but only in return for prospectively higher earnings.[1]

1. The conventional finance theory is stated as follows by John F. Childs:

> ". . . as more debt is added, the rating falls, risk is added and interest cost goes up. Since the added debt pushes the equity securities further out on a limb, their quality declines and an even greater return on them will be required by investors." (*Long-Term Financing*, John F. Childs, Prentice-Hall, Inc., 1961, p. 17.)

Dr. Ileo recognized in the following testimony that financial risk, and presumably cost of equity capital, is greater for a firm with a 50 percent debt ratio than for a firm with a 15 percent debt ratio.

> ". . . two unregulated competitors of comparable size, product line, and operation are likely to have the same business risk. I would also argue that they have essentially the same financial risk if one had a 15 percent debt ratio while the other company had a 20 percent debt ratio. If the ratios were 15 and 50 percent, respectively, then financial risk to the latter firm would be greater since it employs considerably more debt." (Union Gas Limited, Ontario Energy Board, C.B.R.O. 343, March 2, 1976.)

Various tests may be applied to determine whether the rates of return proposed by the protestants are consistent with the opportunity cost standard. Among these tests are coverage of interest charges, the ratio of earnings to prices of stocks traded in the market, other evidence of equity capitalization rates, and earnings on book equity (and on total capital) realized by companies generally comparable with Atlantic Richfield. Returns on capital which would be provided by the interim rates proposed by protestants meet none of these tests.

In the case of ARCO Pipe Line, after tax coverage of interest charges at the interim rates proposed by the Department of Justice would be 1.38 times, 1.28 times or 1.19 times, depending upon whether the computations are made on the basis of a 20, 15 or 10 percent equity ratio (Exhibit 1, Schedule II). The submission by Dr. Ileo also indicates an interest coverage of 1.19 times on the basis of the proposed 14 percent return on an equity amounting to only 9.35 percent of total capital.

Actually experienced after-tax interest coverage varies widely, depending upon differences in capital structure, level of interest rates, profitability of operations and other factors. The average for all manufacturers is at least four times. For Class I railroads, a financially instable industry, with a debt ratio of 40 percent, coverage of interest requirements declined from 3.0 times in 1974 to 2.1 times in 1975.

From the viewpoint of creditors, the coverage ratio measures the margin of protection afforded by total earnings and is a principal test of relative safety and quality of a bond. Interest coverage at the level required by the inden-

ture, often two times requirements, is the minimum coverage fixed by contract to protect existing bondholders against unacceptable dilution of investment value. Earnings of two or more times interest charges may be regarded as adequate for a company in a stable industry.[1]

It is evident that without the guarantee by Atlantic Richfield and the shift of risk to its owners, the ARCO Pipe Line bonds could not have been sold on the basis of the prospective interest coverage which would have been provided on the basis of the interim tariffs proposed by the Department of Justice and the State of Alaska.

A conventional rate of return on book equity, such as the 14 percent used by the Department of Justice, should be applied to the kind of equity ratio to which it is rationally related, not to the thin equity which exists in the special circumstances of ARCO Pipe Line. The ratios of common equity to total permanent book capital at the end of 1976 were 75.6 percent for all manufacturers, 81.0 percent for the petroleum and coal industry and 75.6 percent for Atlantic Richfield.[2] The probability of differences of opinion as to whether, in the case of ARCO Pipe Line, a return of 14 percent is reasonably related to a consolidated book equity in the range of 75 to 81 percent suggests the complexity of the issues presented for the Commission's consideration.

The complexity of the issues is also evident from the assertion by the State of Alaska that: "The pipelines are blatantly asking that they be paid twice for the return on that portion of the investment in the carrier property which was provided by debt capital: first in the form of interest expenses and second in the form of a 'return on investment' calculated against the total cost of the carrier property, which includes debt as well as equity securities" (p. 30).

1. *Financial Handbook,* Jules I. Bogan, 4th edition, Ronald, 7-4.

2. FTC, Quarterly Financial Report, 4th Quarter, 1976; Annual Report to Stockholders Atlantic Richfield.

The characterization of the carriers filings as "double-dipping" tends to obscure the relevant issues and makes no contribution to rational, objective analysis. ARCO Pipe Line contends that its filing is consistent with the formula traditionally applied by the Interstate Commerce Commission in determining just and reasonable pipeline rates, specifically a return of 7 percent on valuation with interest expense treated as an "above-the-line" item. A return of 7 percent is below the debt capital cost rate. The issue is whether the return in dollars provided by 7 percent on total valuation (total capital) is equal to the cost of the debt component plus a reasonable return on the equity component of total capital. A fair return, consistent with relevant economic criteria, is the same dollar amount whether the rate base be original cost of plant and property or a valuation which takes account of the impact of experienced inflation. Similarly, a return is the same dollar amount whether it be calculated by applying a single rate to the valuation or by looking to a weighted cost of debt and equity capital.

The protestants urged the Commission to suspend ARCO Pipe Line's tariff and, in order to permit the transportation to commence, allow substantially lower rates to be filed on short notice. These proposals rest upon the premise that the rate proposed by ARCO Pipe Line is *prima facie* unreasonable. I conclude that the protestants have not shown this premise to be valid. If the tariffs proposed by the protestants were to be made effective, ARCO Pipe Line's operating income would be substantially below the cost of capital employed. Therefore, rates filed by ARCO Pipe Line should be allowed to become effective, subject to the remedies provided by the Interstate Commerce Commission, if the rates are found by the Commission to be in excess of just and reasonable rates.

Protest Reply of ARCO Pipe Line.

VERIFICATION

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss:

J. Rhoads Foster being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

J. RHOADS FOSTER

Subscribed and sworn to before me
this 22nd day of June, 1977.

PAMELA B. NOELL
Notary Public, District of Columbia
My Commission Expires April 30,
1982.

Protest Reply of ARCO Pipe Line.

BEFORE THE
INTERSTATE COMMERCE COMMISSION
DOCKET NO. 36611
TRANS ALASKA PIPELINE SYSTEM

VERIFIED STATEMENT OF JOHN A. JETER
REGARDING RETURN ON EQUITY

My name is John A. Jeter. I am a certified public accountant and, since 1954, have been associated with Arthur Andersen & Co., a firm of independent public accountants. I am presently a partner in that firm and am in charge of the firm's audit practice in Omaha, Nebraska.

At the request of counsel for ARCO Pipe Line Company (ARCO Pipe Line), I have computed the rate of return on equity invested in the Trans Alaska Pipeline System (TAPS) based on the assumption that revenues and expenses (other than interest and income taxes) would not be changed but the capitalization would include 36.4% debt rather than the actual outstanding debt of ARCO Pipeline. The 36.4% debt is based on information supplied to me showing the consolidated capitalization of the Atlantic Richfield Company (which owns 100% of the common stock, and has unconditionally guaranteed all of the debt, of ARCO Pipe Line) as of December 31, 1976, adjusted to add $265 million of 5.90% Valdez Revenue Bonds issued in the first quarter of 1977 and to deduct $25 million of 7% Notes due March 6, 1978, which were paid during the same period. The information supplied to me also indicates that the outstanding debt included in this Atlantic Richfield Company capitalization has a weighted average cost of approximately 7.5% annually.

For illustrative purposes this computation of rate of return was made using the anticipated revenues available for interest, income taxes, and net income included in the 1978 Initial Tariff-Income Summary (Schedule 1 of Appen-

dix A) for ARCO Pipe Line with respect to its investment in TAPS. The amounts are as follows (in millions):

Anticipated revenues available for —	
Interest	$139.0
Income Taxes	124.6
Net Income	113.6
Total	$377.2

The ARCO Pipe Line valuation estimated for TAPS for 1978 (from Schedule 8 of Appendix A) financed with 36.4% debt is as follows:

Total ICC Valuation	$1,957.9
Less-Debt (36.4% of the average ARCO Pipe Line Net Book Value of TAPS facilities)	681.5
Equity	$1,276.4

The following analysis shows the result of computing the rate of return for 1978 assuming the anticipated revenue level but adjusting the interest, income taxes, and net income to the amounts which would result with the above capital structure:

Recomputed Net Income —	
Revenues for interest, income taxes, and net income *(see above)*	$ 377.2
Interest at 7.5% on Debt above	51.1
Income before income taxes	326.1
Income Taxes at 52.32%*	170.6
Net Income, as recomputed	155.5
Rate of Return on Equity	12.2%

* Based upon an effective state income tax rate of 8.3% and a federal statutory rate of 48% (after deduction of state income taxes of 8.3%), and assuming full inter-period income tax allocation.

In order to facilitate comparisons the rate of return on the average book value of equity was computed in the same manner. That rate is 13.1% for 1978; and the weighted average for the period from September 1, 1977 to December 31, 1981 is 15.2%. Also, using the same method of calculation, the weighted average rate of return on the equity portion of ICC valuation for the period from September 1, 1977, to December 31, 1981, is 13.4%.

VERIFICATION

District of Columbia) ss:

John A. Jeter, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

JOHN A. JETER

Subscribed and sworn to before me
this 22nd day of June, 1977.

SHIRLEY C. PURVIS

Notary Public
of the District of Columbia

My commission expires: April 14, 1980

Protest Reply of ARCO Pipe Line.

[Omitted (reproduced in Volume 3)]

Protest Reply of Union Alaska Pipeline Company, June 22, 1977.

[Caption Omitted in Printing]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO.

TRANS ALASKA PIPELINE SYSTEM

Reply of Union Alaska Pipeline Company to protest of the State of Alaska; U. S. Department of Justice; Bureau of Investigations and Enforcement, Interstate Commerce Commission; and Arctic Slope Regional Corporation seeking suspension and investigation of initial rates and tariff provisions for the transportation of crude petroleum via Trans Alaska Pipeline System (TAPS) carriers from Prudhoe Bay, Alaska to Valdez Terminal, Valdez, Alaska, as published effective June 20, 30, and July 1, 1977.

INTRODUCTION

In this reply, Union Alaska Pipeline Company ("Union Alaska") will respond to the various allegations and contentions raised by the four protestants. It will do so collectively, to the extent possible, inasmuch as the four protests reflect, in many respects, similar arguments. Where separate contentions have been made, they will be answered individually.

It is the position of Union Alaska that its rate of $6.09 (ICC No. 2) and the rules set forth in its rules tariff (ICC No. 1) are lawful in all respects, consistent with governing standards, and fair and equitable to all concerned. Union Alaska has no objection, however, to the institution of an investigation as to these matters, and, while it is doubtful that the Commission can compel a refund provision as to

initial rates, Union Alaska is prepared, should the Commission deem it desirable, to publish on short notice a refund provision including the payment of interest at no more than that required of carriers subject to Section 15(8)(e) of the Interstate Commerce Act.

BACKGROUND OF UNION ALASKA PIPELINE COMPANY AND ITS PARTICIPATION IN TAPS

In late 1968 Union Oil Company of California ("Union Oil") became a participant in the Trans Alaska Pipeline System. That was during the engineering and cost estimating phase of the project, then described as a 600,000 B/D system with expansion possibilities to a 2,000,000 B/D system. At that time, Union Oil's participation was at a 3.25 percent level. Shortly thereafter, one of the owners dropped out of the project and Union Oil's interest was increased to 3.32 percent. Subsequently, a decision was made (effective July 15, 1974) to build, essentially concurrently with the 600,000 B/D facility, the additional facilities for a 1,200,000 B/D system. Union Oil elected not to participate in the system expansion and consequently its participation level dropped to 1.66 percent, where it now stands.

Prior to construction beginning, the Union Oil Company's interest in TAPS was transferred (effective January 8, 1974) to a newly created company, entitled Union Alaska Pipeline Company, incorporated in the State of California and wholly owned by Union Oil.

A. Uniqueness of Union Alaska Pipeline

At the time of taking an interest in TAPS, Union Oil had the primary expectation of realizing a reasonable rate of return on its pipeline investment in light of existing Con-

sent Decree standards. In addition, Union Oil had hopes of realizing oil production on the North Slope of Alaska by approximately the time the pipeline became operable. However, Union Oil is *not* a crude oil producer on the North Slope and this single fact makes Union Alaska's situation unique when compared to all other owners in TAPS. Moreover, it is a fact ignored by all of the protestants who are in a position to know the truth. Indeed, the protestants have blanketed Union Alaska in with all of the producers. Union Alaska's entire investment in TAPS must be supported by revenue largely from unaffiliated shippers on its pipeline capacity, and its rate has been kept to the lowest possible minimum to attract such traffic. Two other TAPS owners, Mobil and Amerada Hess, do have pipeline capacities significantly in excess of their respective crude production rates, giving their situations some similarity to that of Union Alaska. This fact is also ignored by protestants.

B. Cost Escalation

Frequent reference is made by protestants to the fact that the original cost estimate for TAPS was greatly exceeded with the completed cost being in excess of 9.0 billion dollars, and from this flow assertions of inefficient management. The difference between the original cost estimate and final cost is accounted for by many factors, most of which can be attributable to the actions of certain of the protestants and other interests. Some of the principal factors were (a) very demanding and costly environmental stipulations; (b) lower labor productivity than previously estimated, because of severe climatic conditions; (c) the long delay in being granted the construction permit, which pushed construction into the recent double digit inflationary period; and (d) much higher labor rates than had been expected.

With regard to assertions of improvidence or inefficiency on the part of protestants, particularly by the State of Alaska, both the Supreme Court and this Commission place a heavy burden on those making such allegations. The Court stated in *West Ohio Gas Co.* v. *Ohio Pub. Utility Comm'n.*, 294 U.S. 63, 73 (1935):

> "Good faith is to be presumed on the part of managers of a business. . . . In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as a measure of a prudent outlay."

To the same effect, see *Hanna Mining Co.* v. *Missouri Pacific R. Co.*, 332 I.C.C. 166, 171 (1968). The melange of assertions by Mr. Lenzner, many of which rely on owner quotations taken out of context, have been structured so as to reach a preconceived result. No credit is given to the fact that this gigantic project was successfuly completed in a timely manner in the face of the heaviest of obstacles both natural and man-made. The one-sided presentation of protestants affords no basis for a restructuring of the rate level at the suspension stage.

Nor does it afford a basis for the unbridled discovery sought by the Bureau of Investigations and Enforcement in flat violation of the form and procedure required by the Commission's Rules of Practice. Discovery requests should properly be made before the presiding administrative law judge where appropriate justification therefore can be made. They have no place at the suspension level. See Special Rule of Practice 200, 49 CFR § 1100.200. Stated in another way, there is a proper way to go about such discovery. Failure to do so can result in judicial restraint. See *Union Oil Co. of Calif.* v. *FPC*, 542 F.2d 1036 (9th Cir. 1976). In a similar vein, requests of the Commission staff and those

functioning on their behalf for data or information must be made on the record. See *Davis & Randall, Inc.* v. *United States*, 219 F. Supp. 673 (W.D. N.Y. 1963); *Home Box Office, Inc.* v. *F.C.C.*, No. 75-1280 (D.C. Cir., March 25, 1977).

CONTENTIONS OF PROTESTANTS AND REPLIES THERETO

1. Valuation Methodology

In varying degree, the State of Alaska, the Department of Justice, and the Arctic Slope Regional Corporation attack the methodology used by this Commission in establishing rates based on the valuation of the property owned and used by the joint owners. Indeed, the State of Alaska opposes the use of the Commission's valuation as a rate base.

Protestants' quarrel is basically twofold: their first and most obvious concern is with Section 19a(i) of the Interstate Commerce Act which accords a carrier's final valuation prima facie weight as evidence of the value of the property in all proceedings under the Act. An evaluation of initial rates in the suspension phase of Section 15(7) is hardly the proper framework in which to pass upon the continuing validity of a statute. Congress is the more appropriate forum. However, when Congress enacted the provisions of the Railroad Revitalization and Regulatory Reform Act of 1976, pipelines, which along with railroads are Part I carriers, were specifically excluded from the scope of the new statute. As stated by the House Committee on Interstate and Foreign Commerce:

> "The Committee has not included oil pipelines in it (i.e., the new standards of rate making), since there

does not, at the present time, appear to be a need to do so. Under Part I of the Interstate Commerce Act, the tariff rates of interstate common carrier oil pipelines are subject to ICC regulation to the same extent as those of railroads. Historically, in determining the reasonableness of the rates of an oil pipeline, the ICC has based such determination upon the annual valuation of the pipeline established by the Commission. Included in the formula used by the Commission in establishing annual valuations of pipeline companies is a factor reflecting the reproduction cost-new of the pipeline system, less depreciation. The use by the ICC of the annual valuation of the pipeline in determining the reasonableness of its rates has permitted the industry to generate common carrier revenues and earnings adequate to engender substantial capital investment in, and needed expansion of, the nation's pipeline network."[1]

Second, to the extent that protestants' concerns relate to valuation methodology, as distinct from the use and merits of Section 19a, this Commission has already indicated that pending Docket Ex Parte 308 is the appropriate proceeding in which to consider such matters, and the State of Alaska and the Department of Justice have filed statements therein. Moreover, by Supplemental Order served December 16, 1975, in Ex Parte 308, the Commission determined, in effect, that that proceeding looks to issues for prospective effect and that existing valuation, accounting, and property reporting requirements should continue to govern pending proceedings.

What protestants advocate here at the suspension level, where the proceedings are informal (see 49 CFR

1. H.R. Report No. 93-1381, 93rd Cong., 2d Sess. P. 26, n.1 (1974).

§ 1100.200(a)) and where a protest is prohibited from being considered a formal complaint (49 CFR § 1100.42(a)), is that the statutory scheme be replaced with what effectively constitutes a rule-making proceeding of their own invention. There is no warrant in law for such an approach. See *N.L.R.B.* v. *Wyman-Gordon Company,* 394 U.S. 759, 764-766 (1969); *Wagner Electric Corp.* v. *Volpe,* 466 F. 2d 1914 (3rd Cir. 1972); *North American Van Lines Inc.* v. *United States* 412 F. Supp. 782 (N.D. Ill. 1976); *A. E. Staley Mfg. Co.* v. *United States,* 310 F. Supp. 485 (N.D. Minn. 1970); *Chicago, Burlington & O.R. Co.* v. *United States,* 242 F. Supp. 414 (N.D. Ill. 1965), aff'd per curiam, 382 U.S. 422 (1966).

At the very least, protestants' advocacy of a new and unprecedented standard in I.C.C. regulation carries with it a heavy burden of making a convincing showing that the established standards are unreasonable. See *Nader* v. *Federal Communications Commission,* 520 F. 2d 182, 192 (D. C. Cir. 1975). Protestants have completely failed in this burden. Union Alaska and those who have invested in it were and are entitled to rely upon the pattern of regulation in the pipeline industry as set forth in the Consent Decree and consistent Commission precedent. See *Secretary of Agriculture* v. *United States,* 346 U.S. 645, 653-654, (1954).

2. Rate of Return on Shareholders' Equity as a Standard For Pipeline Ratemaking

Much of our preceding views relative to the impropriety of discarding valuation has application to protestants' contention that rate of return on equity should be applied as a standard. Initially, it should be stated that such a test has never been applied to oil pipelines, including Williams Pipe

Line in Docket Nos. 35533 et al., and pending I. & S. Docket No. 9089. Moreover, such a test is absurd on its face since almost all of the TAPS carriers are Consent Decree carriers, and thus are barred by court order from paying more than 7 percent in dividends to their equity owners. Quite obviously, the return on equity concept is designed to measure payments to shareowning interests to determine if they will gain an inordinately high return. Yet, the Consent Decree bars payments over 7 percent, a test in effect for over 36 years which has never been modified notwithstanding the vast changes in industry generally and oil pipelines in particular.

It must also be emphasized that the Department of Justice is as equally bound by the Consent Decree as are the companies involved, and that agency's advocacy here of a different and conflicting concept constitutes, at the very least, a collateral attack on the Decree.

The Consent Decree is a most pervasive form of economic regulation, and effectively subsumes into it, by its very nature, any asserted violations as to Sections 1, 2, 3(1) and the National Transportation Policy. Probably no other regulated industry has remained under such a restraint, judicial or otherwise, for so long a time. The Consent Decree limitation is a firm and unwavering limitation unlike the 8 percent and 10 percent "benchmarks" against which crude and product pipeline rates, respectively, have been measured. These "benchmarks" are *not* prescribed standards. In actual practice, they have been merely guidelines by which the rates of pipelines have been measured, along with other considerations, and found lawful; they are themselves the subject of re-evaluation in Ex Parte No. 308.

As to Union Alaska, return on equity is a meaningless and inapplicable calculation in any event in view of the

company's capitalization. On April 30, 1977, Union Alaska's balance sheet showed the following liabilities:

	Million Dollars
Short term notes	118.1
Accounts payable	0.8
Notes payable to Union Oil Company	2.5
Capital stock	5.0
Unappropriated surplus	1.8
	128.2

Since that date, Union Alaska has reached verbal agreement for the private placement of $83.125 million in 8.30 percent long term promissory notes. The notes, as well as Union Alaska's short term obligations, are fully guaranteed by Union Oil. The investors required this parent company's support and corresponding liability for its shareholders due to the financial uncertainties associated with the TAPS project.

Union Alaska has not computed a "cost of equity" and does not believe that such a computation would be meaningful for the following reasons. The tariff rate Union Alaska proposes to charge its customers is determined by the maximum dividend allowable under the Consent Decree. That calculation requires no determination of "cost of equity." Since Union Alaska is a wholly-owned subsidiary of Union Oil, any such computation would be meaningless in any event. In addition, the business reasons for Union Oil's participation in the TAPS project simply had nothing to do with the cost of equity. The financing pattern and allowable tariff had been effectively established by the Consent Decree precedent with which Union Oil and Union Alaska and others must live. Under these rules, the expected tariff was thought to be reasonable in the circumstances and Union Oil joined the project.

3. Twenty-Five Year Life Versus Thirty-Five Year Life

It is variously asserted that something higher than a 25 year life should have been utilized. The Arctic Slope Regional Commission asserts a useful TAPS life of 35 years. The Bureau of Investigations and Enforcement relies on the van Poollen Study and asserts that it describes a range of oil recovery lives of 25 to 30 years. Such a conclusion represents a misstatement of that study's contents. In fact, it describes case lives ranging from 17.25 to 28.75 years and implicitly supports the 25 years relied upon by the carriers. A 25 year life is also consistent with the independent De Golyer and MacNaughton Study prepared for the owners. All such studies properly relate to maximizing oil recovery of known existing recoverable reserves. While other potentially recoverable reserves may exist, they must be considered a contingency at best; they hardly constitute a firm and reliable basis upon which to deprive the carriers of wholly needed revenue.

The original 25-year projected economic life of the Cook Inlet Pipeline in Alaska is a good example of a pipeline life falling short of the 35 year life normally used for trunk lines that serve many producing fields. As with the Cook Inlet Pipeline, TAPS is a pipeline serving a single or local area of production. Union Alaska management is entitled and, indeed, required to rely on known existing recoverable reserves and not on speculation since to establish rates based upon such contingencies adds to the burden of risk assumed by the investors. In fact, if this risk is to be so increased, a higher overall rate of return may well be justified.

It must also be recognized that the additional reserves described by the protestants may be uneconomical to recover, *not* because of the rates charged by the carriers but because of any of a number of geologic, economic, political,

social or environmental reasons. Failure to take such factors into account indicates the patent narrowness of protestants' contention. The physical life of the line must be viewed conservatively because of its extreme length and the climatic conditions affecting it.

4. Risk

An element of risk is present in any new venture. All of the protestants, and particularly the State of Alaska, contend that the question of risk does not exist. Such postures suggest their lack of real-world familiarity with the subject. Nevertheless, a consideration of all risks from the time of inception of TAPS indicates that they are, and will continue to be substantial. Among the prior risks were the following:

1. The TAPS line constituted a great private undertaking with severe climatic, mechanical, and environmental problems. There was no absolute assurance that it could be done, or, that it would operate as designed.
2. Inflation.
3. Changing governmental regulation.
4. Environmental considerations.
5. Delays in construction.

Among the present risks to be faced are:

1. If substantial discoveries of oil, breakthroughs in technology in oil shale, nuclear or solar energy, or a breakdown in the world oil pricing mechanism, etc., occur, the most costly, inaccessible and least desirable sources of crude production would de-

cline. The Alaskan North Slope crude production would undoubtedly be reduced in such a situation, thus lowering line throughput.

2. The line is vulnerable to attack or sabotage by anyone ranging from an enemy to a blackmailer.

3. Environmental damage through a break in the line or other causes may result in extensive damage claims.

4. Reports indicate there will be a surplus of crude oil on the West Coast once the line is fully active. If permission to ship Alaskan crude to foreign countries or to trans-ship the West Coast crude to the Gulf is hampered, a reduction in Alaskan crude production would probably result, lowering the line throughput.

5. New environmental rules that make high sulphur Alaskan oil less desirable.

6. The risk of state and federal regulatory changes.

7. Changes in taxation, some of which have already been discussed in the Alaska legislature.

8. Labor: strikes, lack of productivity, excess in wage demands, etc., in the pipeline itself or in the oil fields, in terminaling, shipping, or refineries.

9. Geologic risks, such as the field failing to live up to performance expectations.

To ignore these factors, as protestants have done, is to obscure the realities facing the pipeline owners.

5. Taxes

It is asserted by protestants that the use of tax normalization should be disallowed. The net effect of such an approach would be to subsidize present-day shippers to the detriment of those who may later come on line. The virtues of normalization have again been recognized in the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *The Second National Natural Gas Rate Cases,* No. 76-2000, decided June 16, 1977, (D.C. Cir.). In this far-reaching decision with its wide-ranging implications for a Nation "engaged in a searching review of its entire energy policy and a possibly restructuring of agency powers" (slip opinion at p. 93), the court both rejected as "simplistic" the interpretation that only "actual taxes paid" can govern (slip opinion at p. 38) and indicated that if any policy change were required, a "combination of the higher probability that substantial taxes will be paid and the likelihood that there will not be acquiescence in indefinite deferral of tax revenue" would support such a change (slip opinion at p. 39).

Union Alaska clearly fits within these concepts. It computed book depreciation, using a 25 year life which was determined on the basis of the best information available. Union Alaska is both a wholly-owned subsidiary of the Union Oil and is a member of the consolidated group which files a federal income tax return. Union Oil has elected Asset Depreciation Range ("ADR"), as provided under Internal Revenue Code Section 167 and regulations thereunder and as provided in Rev. Proc. 77-10, permitting the taxpayer to select depreciable lives which, for pipeline transportation properties, range from 17.5 years to 26.5 years. Union Oil and its affiliates have adopted a policy of using the lowest ADR life in computing depreciation

under the ADR election. In conjunction with the ADR election, Union Oil has adopted the double-declining balance method, with a switch to the sum-of-the-years-digits method for purposes of computing allowable depreciation.

The foregoing method of computing depreciation creates a larger deduction for tax depreciation than book depreciation during approximately the first twelve years of the pipeline life. This larger depreciation deduction, in turn, reduces the amount of federal income tax currently applicable to Union Alaska compared with the amount of income tax that would be payable if straightline depreciation had been adopted. Thus, in order for Union Alaska to properly take into account its income tax for rate-making purposes, it is compelled to adopt "deferred tax" accounting (i.e., "normalizing"). If the tax expense for rate-making purposes were not normalized through deferred tax accounting, the federal income tax expense would be lower in approximately the first twelve years and greater in the remaining years. The effect of this would cause current rate payers to pay lesser tariffs than future rate payers because of the tax benefits of greater depreciation in the earlier years. Another effect of flowing through the tax benefits of accelerated depreciation is that the pipeline company is effectively precluded from adding accelerated funds to its working capital as intended clearly by Congress.

In summary, normalization accords fully with the intent of Congress with respect to the use of accelerated depreciation and investment tax credit; is in accord with rulings of the American Institute of Certified Public Accountants; ensures that substantial taxes will be paid in the foreseeable future; and is consistent with the rational of *The Second National Natural Gas Rate Cases, supra,* this Commission's approach in *Petroleum Products, Williams Brothers Pipe Line Company,* ICC , served December 21, 1976, slip opinion at p. 14, citing *Memphis Light*

Gas & Water Div. v. *Federal Power Com'n.,* 500 F.2d 798 (D.C. Cir. 1974),[1] and the thoroughgoing treatment of this subject in the submission of the Association of Oil Pipe Lines in Ex Parte 308. No different treatment is warranted here at the suspension level.

6. Restoration Costs

Alyeska has estimated a cost of $1,049 million for dismantling the line and restoring the environment. This is expressed in terms of 1977 dollars. If inflation increases at an annual rate of 6 percent, for example, dismantling the restoration costs will be $4,490 million at the end of 25 years.

The State of Alaska says that the $.10/bbl included in the tariff to cover the restoration cost (which is simply 1/25th of $1,049 million per year divided by 1.2 million bbls/day) is too high because it ignores the earning capacity of the removal fund and is based upon a 25 year rather than a 35 year pipeline life. The logic and merits of the 25 year life have been discussed above. The fact is that the earning capacity of the removal fund must be retained in order to compensate for the effects of inflation over the life of the project. Otherwise, the line would have $1,049 million on hand at the end of 25 years to pay for a $4,490 million expense—assuming 6 percent inflation.

7. Interest Expense

The question of the recovery of interest expense reflects perhaps the most egregious example of protestants' misunderstanding of real-world economics. In Union Alaska's view, interest expense must be considered as an allowable

1. As of its 1976 Form P Annual Report, Williams Pipe Line's average effective tax rate had risen to 44.8%, thus underscoring the accuracy of the Commission's approach.

expense to be recovered in the tariff rate. The investment economics of TAPS, or any other common carrier pipeline, under the 7 percent earnings limitation of the Consent Decree, are based on, and require the recovery of interest as an allowable expense.

Within the context of a 7 percent limitation on dividend payments, the argument presented by the protestants that either interest expense be excluded from the tariff rate or an allowable return be established only on the equity portion of the investment *completely ignores the fact that the debt-supported portion of the investment must also generate a return or such an investment would not be attractive.* It must be emphasized that such debt is a very real liability of the shareholders, rather than a carrier liability as would be the case if carrier assets, for example, were pledged against the debt. Therefore, the shareholders are entitled to the full dividend based on 7 percent of valuation, net of any interest payments.

The Justice Department has proposed that TAPS tariffs be set on the basis of a 14 percent return on equity which again offers no return on valuation (and investment) supported by debt. If such a return were appropriate on 14 percent equity, for example, would it not, by the same argument, be appropriate on 100 percent equity? In this latter case, a tariff level of about $7.50/bbl would be required. We doubt that this is what they have in mind.

The subject of interest expense for Consent Decree carriers has never been conclusively resolved by this Commission. In the *Williams* decision of Division 2, *Petroleum Products, Williams Brothers Pipe Line Co.,* 351 I.C.C. 102, 136 (1975), the placement of interest "below the line" was apparently the result of the decision by Williams, an independent carrier, to state its case in the most conservative manner possible. On the other hand, in reporting to Con-

gress on the carriers' average return on investment for companies owning oil pipelines, the Commission gave effect to interest. See "Regulations of Various Federal Regulatory Agencies and Their Effect on Small Business," Hearings before the Subcommittee on Activities of Regulatory Agencies of the Committee on Small Business, House of Representatives, Ninety-Fourth Congress, First Session, Los Angeles, California, August 29; Washington, D.C., October 2 and November 12, 1975, pp. 873, et seq., as corrected by letter of Chairman Stafford to Subcommittee Chairman Hungate, dated March 22, 1975. In addition, in Docket No. 36352, *Petroleum Crude Oil, Griffith, Ind. to N.Y. State Points,* initial decision served November 15, 1976, which became final by operation of law by notice served December 15, 1976, the increased rate there at issue was found lawful with interest as an item of expense.

There is most assertedly no unfair recovery in the approach taken by Union Alaska. The interest computed is discretely and separately stated. *The failure to permit the recovery of so substantial an item of expense could only result in one of the sharpest disincentives to investment by private capital in meeting the Nation's energy supply emergency.* Whatever doubts may exist in this regard should properly be resolved in favor of a pragmatic adjustment to remove any possible severe and unwarranted constraints. See *The Second National Natural Gas Rate Cases, supra,* at slip opinion, p. 92.

BOTH THE LAW AND THE EQUITIES FAVOR THE APPROACH RECOMMENDED BY UNION ALASKA

As indicated heretofore, Union Alaska has no objection to an investigation of the rates at issue subject to the publication on short notice of a refund provision with interest at no

higher than that currently required of other carriers subject to Section 15(8)(e) of the Act. Union Alaska believes that that Section provides an analogous and current expression of Congressional direction. The provision provides for refunding of increased rates found not justified with interest at a rate equal to the average yield (on the date the rate schedule was filed) of marketable securities of the United States which have a duration of 90 days. While that provision applies only to railroads and only to increased rates, Union Alaska is prepared to accept it in this proceeding. In Union Alaska's view, such an approach is eminently fair and protects all present or reasonably prospective shippers in a manner not inconsistent with law. Moreover, in contrast to protestants' demands for various rate prescriptions at various lesser levels at this time and on this informal record, Union Alaska's approach prevents the loss forever of revenue to which it believes it is entitled as a matter of law, economics, and fair and even-handed treatment.

Protestants, on the other hand, seek what flatly constitutes a rate prescription at this time and in a context where much of their allegations are variously conjectural, lacking in specificity, unsworn, and not subject to cross-examination. There is no instance where this Commission has ever adopted such an approach as to initial rates. Where the Commission has suspended rates without prejudice to a republication at some lesser level or subject to the utilization of funds for a special purpose, such action occurred only in general revenue-need proceedings where changes in rates were involved, where a waiver of Commission tariff publishing regulations were sought, where the Commission had previously established by formal order the type and form of supporting data required, where shippers had no recourse to judicial review without exhausting their administrative remedy through the filing of a complaint, and where the order fashioned conformed to the carriers' own supporting evidence.

No such situation exists here. The rates at issue are initial rates. The publishing carriers have a statutory right to have the protestants meet their burden of proof at a hearing on the record. Ignoring that right by a rate prescription at the suspension stage of the case would unlawfully deprive them of due process and constitute an unlawful taking of their property. See *Moss* v. *C.A.B.*, 430 F.2d 891 (D.C. Cir. 1970).

It must also be recognized that there is no presumption of wrong arising from either a change of rate or an initial rate of a carrier. As stated by the late Commissioner Freas, as to the publishing of rates ". . . the presumption of honest intent and right conduct attends the actions of carriers." Freas, "Ratemaking Powers of the ICC," 31 George Washington Law Review 54, 67 (1962). Commissioner Freas recognized that "comparison of the suspension procedure with that of a restraint proceeding in a court of equity emphasizes that both are discretionary and extraordinary remedies." *Id.* at 68. No extraordinary factors exist to warrant the exercise of that remedy here in the manner urged by protestants. No prima facie errors are shown on the part of the carriers, or Union Alaska in particular. Conversely, a firm basis has been demonstrated in law and fact for the use of the statutory tax rate; interest has been properly computed and allocated; the Consent Decree's mandates have been complied with; a reasonable foundation for the 25-year life has been shown; the removal costs are properly stated; risk is substantial; and present and reasonably foreseeable shippers can be protected in a manner not inconsistent with law.

Protest Reply of Union Alaska.

To the extent that the Commission may wish to inquire further into the protestants' allegations, it may properly do so via a full hearing and on a formal record. To attempt to fit the carriers and Union Alaska in particular to protestants' Procrustean bed is unlawful, discourages the investment of private capital, and is inimical to the Nation's best energy and economic interests.

WHEREFORE, Union Alaska Pipeline Company respectfully requests that the proposed tariff be allowed to become effective subject to investigation and the publication of a conditional refund provision by each carrier, such provision to include interest at a rate consistent with Section 15(8)(e) of the Act.

Respectfully submitted,

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[Certificate of Service Omitted]

Second Supplement to Protest Petition and Complaint by Arctic Slope Regional Corporation, June 23, 1977.

BEFORE THE INTERSTATE COMMERCE COMMISSION

[Caption Omitted]

SECOND SUPPLEMENT TO PETITION AND COMPLAINT BY ARCTIC SLOPE REGIONAL CORPORATION FOR SUSPENSION OF INITIAL RATES AND RULES FOR TRANSPORTATION OF PETROLEUM VIA THE TRANS ALASKA PIPELINE SYSTEM (TAPS) FROM PRUDHOE BAY, ALASKA, TO VALDEZ, ALASKA, AND FOR AN INVESTIGATION THEREOF

In its statement of justification to the Commission, Sohio explained the basis for its rate tariffs. Set forth in Attachment A is ASRC's supporting data for its proposed $3.00 reduction in Sohio's tariffs, which amount should be used in reduction of all other proposed TAPS tariffs in the absence of evidence indicating that such other rates are supported by considerations other than those advanced by Sohio.

In Column A there is listed the Sohio data which is the basis for a $6.16 pb rate. Column B sets forth ASRC's adjustments to the Sohio data, which indicate that a $3.00 reduction is necessary. In Column C, ASRC's proposed 15% reduction in capitalized costs and capital is not included as it is in Column B calculations, and the resulting rate is $3.69 pb. Recent news reports indicate that there is the likelihood of an oil glut on the West Coast, but that TAPS oil may be swapped with Japan and other countries in exchange for East Coast crude oil deliveries. In this event, TAPS throughput may quickly reach 2.0MMbpd, and the calculations in Column D support a rate tariff under those circumstances of $2.28 per barrel.

Supplement to Protest by Arctic Slope.

The assumptions propounded by the TAPS carriers as reflected in the Sohio data which is analyzed in the attachment hereto prima facie are improper. The unreasonably high rates should be suspended, therefore, because they are unreasonable, and also because of their anticompetitive effect on oil exploration in the Arctic North Slope, in contravention of the National Transportation Policy and antitrust laws. Accordingly, the Commission should order suspension and an investigation, granting special permission to file and make effective on one day's notice rates which are $3.00 less than those initially issued, pending conclusion of a suspension and investigation proceeding.

Respectfully submitted,

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Supplement to Protest by Arctic Slope.

JUSTIFICATION FOR ARCTIC SLOPE REGIONAL CORPORATION $3.00pb REDUCTION IN PROPOSED TAPS RATE TARIFFS USING SOHIO PIPE LINE COMPANY DATA

Line		A. SOHIO DATA AND COMPUTATION 1/ (146MMb per year) Total ($000,000)	¢pb	B. SOHIO CAPITALIZED COST, INTEREST, USEFUL LIFE OF TAPS, AND IMPUTED TAXES AS ADJUSTED BY ASRC (146MMb per year) Total ($000,000)	¢pb	Dif. A & B ¢pb	C. SOHIO INTEREST, USEFUL LIFE OF TAPS AND IMPUTED TAXES AS ADJUSTED BY ASRC (146MMb per year) Total ($000,000)	¢pb	Dif. A & C ¢pb	D. SOHIO INTEREST, USEFUL LIFE OF TAPS AND IMPUTED TAXES AS ADJUSTED BY ASRC (243.38MMb per year) 12/ Total ($000,000)	¢pb	Dif. A & D ¢pb
1	Operating Revenue Lines 7+9+10	899.4	616	461.4	316	(300)	538.5	369	(247)	555.3	228	(388)
	Operating Expenses											
2	Ad Valorem Taxes	51.0	35	51.0	35	(0)	51.7	35	(0)	51.7	21	(14)
3	Interest	252.5	173	195.6 6/ 7/	134	(39)	252.5	173	(0)	252.5	104	(69)
4	Removal & Restoration	14.0	10	10.0 8/	7	(3)	10.0 8/	7	(3)	10.0	4	(6)
5	Depreciation	126.2	86	76.2 9/	52	(34)	90.1 9/	62	(24)	90.1 9/	37	(49)
6	Other	84.2	58	84.2	58	(0)	84.2	58	(0)	101.0 11/	42	(16)
7	TOTAL	527.9	362	417.0	286	(76)	488.5	335	(27)	505.3	208	(154)
8	Net Operating Revenue before Taxes	371.5	254	44.4	30	(224)	50.0	34	(220)	50.0	21	(233)
9	Imputed Income Taxes	196.5 2/	135	12.9 10/	9	(126)	14.5 10/	10	(125)	14.5 10/	6	(129)
10	Net Income After Tax	175.0	119	31.5	21	(98)	35.5	24	(95)	35.5	15	(104)
11	Valuation	3315.0		2667.7 11/			3138.5			3138.5		
12	TAPS Capitalized Costs	3138.5		2667.7 6/			3138.5			3138.5		
13	Equity	444.0		377.4 6/			444.0			444.0		
14	Debt	2707.5		2301.4 6/			2707.5			2707.5		
15	Total Capital Lines 13+14	3151.5		2678.8 6/			3151.5			3151.5		
16	Return on Equity 3/	39.4%		8.3%			8.0%			8.0%		
17	Return on Total Capital 4/	13.6%		8.5%			9.2%			9.2%		
18	Return on Valuation 5/	12.9%		8.5%			9.2%			9.2%		

NOTE: Columns may not add because of rounding.

Supplement to Protest by Arctic Slope.

Notes

1. Source for all data: Sohio letter dated June 13, 1977, and Schedules attached, unless otherwise indicated.

2. Sohio uses statutory rate of 52.9% rather than the flow through method which allows for consideration of the effect of accelerated depreciation and investment tax credit.

3. Line 10 ÷ Line 13.

4. (Line 10 + Line 3) ÷ Line 14. Note, that Sohio does not include interest as a return on valuation.

5. (Line 10 + Line 3) ÷ Line 11. See note 4 above.

6. Capitalized costs of $3138.5 million, Equity of $444 million and Debt of $2,707.5 million reduced by 15% because of the TAPS overrun caused by Alyeska mismanagement. See, Protest/Complaint, State of Alaska, pp. 6-11; ASRC Petition and Complaint, pp. 10-11.

7. Interest at 9.3% reduced to 8.5% based upon Sohio Cost of Borrowed Funds—see, Attachment A-1.

8. ASRC calculates Removal and Restoration Cost as amortized over 35 years. $1,049 billion ÷ 35 = $.02997 billion. $29.97 million × .3334 = $9.99 million per year, or 6.8¢ pb, a 29% reduction. See, Protest/Complaint, State of Alaska, pp. 45-51, and ASRC Petition and Complaint, p. 15.

9. ASRC calculates Depreciation Expense on the basis of a useful life of 35 years. Depreciation equals capitalized cost divided by 35 and, as a non-cash deduction, constitutes a return on capital over 35 years and a source of working capital.

10. In using a statutory tax rate of 52.9%, Sohio fails to account for the 10% investment tax credit by which it benefits. According to the Mortada Study (FEA) (Nov. 1976), p. IV-19, the effective tax rate is reduced to .476 as a result of the tax credit.

Further, Sohio computes its taxes as if depreciation for tax purposes were deducted on a straight-line basis. If, to the contrary, depreciation is deducted on the basis of 200% of declining balance, depreciation deductions in the early years of TAPS operation will reduce federal income taxes substantially. Taxes will be reduced further by substantial investment tax credits of 10% of the cost of the pipeline, or approximately $313.9 million. This credit may be used, up to 50% of Sohio's tax liability, to offset not only TAPS income but also other income of Sohio on a consolidated return. SEC Form S-1, filed by the British Petroleum Company Limited on June 14, 1977, Registration No. 2-59269, states that net income taxes for 1976 were $56 million on $192.9 million of net income, which amounts to an imputed rate of 29%. Page F-39. It further is stated

that $36 million of the $56 million in taxes were deferred, resulting in an effective and actual tax rate of 10.4 percent. Page F-45. These figures support ASRC's position that the statutory tax deduction proposed by Sohio is unwarranted for purposes of computing returns on valuation and capital and that the "flow through" method should be used in this rate-making proceeding.

Using a 10.4% imputed rate and all of Sohio's other data, net income for 1978 would be $332.9 million, resulting in a return on equity of 75%, a return on Total Capital of 18.6%, and Net Income as a Percentage of Valuation of 10%. These returns on invested capital are unparalelled in American industry and the Commission should not countenance them at the expense of ASRC and the American consuming public.

For purposes of ASRC's adjustments, an imputed tax rate of 29% is used, although a substantially lower rate may be warranted.

11. ASRC proposes that principles previously used by the ICC in the calculation of valuation are inappropriate for TAPS and that cost of reproduction new, as a basis for valuation, not be applied. This is particularly so where Sohio and the other TAPS carriers claim that the pipeline must be removed after 25 years and seek to amortize removal expenses over that period. Working capital allowance also is eliminated on grounds that non-cash deductions, such as depreciation, will provide sufficient working capital. The method of valuation proposed by Sohio and other TAPS carriers (1) fails to recognize the time value of investment recovered through depreciation and return on equity, (2) improperly double charges the rate payer by the use of a 6% additive for "going concern" value, (3) provides for a windfall recovery by equity owners not only on the basis of their own investment but also on the basis of the amount of debt for which compensation is provided in the charging of interest, and (4) fails to account for the TAPS carrier claims that the pipeline must be removed after 25 years. ASRC proposes valuation based upon actual investment.

12. Column D assumes transportation of 2.0 million barrels per day, of which Sohio's .3334 interest equals 243.38 million barrels per year, and otherwise uses the same adjustments as Column C.

13. Operating expense increased by estimated 20% for additional throughput of .8MMbpd.

ATTACHMENT A-1

COMPUTATION OF SOHIO COST OF BORROWED CAPITAL

At page F-49 of Form S-1, filed with the SEC by The British Petroleum Company, Limited, on June 14, 1977, Registration No. 2-59269, the long-term debt of Sohio is listed. The list follows, to which is added a column listing the annual interest payable (or estimated payable):

	December 31, 1976	Annual Interest
	(Thousands of Dollars)	
Guaranteed notes—10⅝% ($39,254 due in 1980, $78,509 annually 1981-1992, $46,220 in 1993, $35,161 annually 1994-1997, $8,104 in 1998)	$1,176,330	$124,985.1
Guaranteed notes—9¾% ($11,176 due in 1980, $22,353 annually 1981-1992, $9,403 in 1993, $4,971 annually 1994-1997, $1,147 in 1998)	309,846	30,210.0
Guaranteed note—8⅝% (due in 1983)	169,500	14,619.4
Guaranteed note—9¼% ($1,695 due annually 1980-1984, $8,475 annually 1985-1998, $42,375 in 1999)	169,500	16,526.3
Notes—6⅛% (due in 1979)	75,000	4,593.8
Notes—6½% (due in 1981)	75,000	4,875.0
Notes—7½% (due in 1986)	200,000	15,000.0
Notes—7.1% (due in 1977)	200,000	14,200.0
Notes—7.6% (due in 1979)	50,000	3,800.0
Notes—8% (due in 1981)	75,000	6,000.0
Debentures—8¼% ($7,750 due in 1986, $15,500 annually 1987-2000, $25,250 in 2001)	250,000	21,875.0
Debentures—8½% ($6,300 due annually 1981-1999, $30,300 in 2000)	150,000	12,750.0
Debentures—7.6% ($4,200 due annually 1980-1998, $20,200 in 1999)	100,000	7,600.0
Sinking fund debentures—4¼% ($1,250 due annually 1978-1981, $997 in 1982)	5,997	254.9
Notes payable to banks—variable interest rate—6¼% at year-end ($15,000 due annually 1978-1980, $7,500 in 1981)	52,500	3,281.3

Supplement to Protest by Arctic Slope.

	December 31, 1976	Annual Interest
	(Thousands of Dollars)	
Promissory notes—4.55% ($2,000 due annually 1978-1989, $10,000 in 1990)	34,000	1,547.0
Revolving credit notes—variable interest rate—6.9% at year-end	100,000	6,900.0
Revolving credit notes—variable interest rate—6⅞% at year-end	100,000	6,875.0
Promissory notes (4.6% to 5.8% at year-end) Assume average at 5.2%	212,716	11,061.2
Payables incurred by agent (Alyeska Pipeline Service Company) for construction of trans-Alaska pipeline	79,000	
Industrial revenue bonds—5⅜% to 5⅞% (due annually in varying amounts, 1986-1998) Assume average 5.7375%	37,900	2,174.5
Other Assume 8.5%	4,558	387.4
	$3,626,847	$309,515.9

On the basis of the above data, Sohio's average interest rate, or cost of borrowed capital, at year end is approximately 8.5%.

[Certificate of Service Omitted]

Reply of Sohio Pipe Line Co. To Protests, June 22, 1977.

BEFORE THE INTERSTATE COMMERCE COMMISSION

[Caption Omitted in Printing]

REPLY OF SOHIO PIPE LINE COMPANY TO THE PROTESTS AND PETITIONS FOR SUSPENSION OF ITS INITIAL TARIFF, I.C.C. NO. 742, SUPPLEMENT NO. 1, FOR THE TRANSPORTATION OF PETROLEUM FROM PRUDHOE BAY, ALASKA TO VALDEZ, ALASKA VIA THE TRANSALASKA PIPELINE SYSTEM

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BEFORE THE
INTERSTATE COMMERCE COMMISSION
I.C.C. Docket No. 36611

TransAlaska Pipeline System—Initial Rates

REPLY OF SOHIO PIPE LINE COMPANY TO THE PROTESTS AND PETITIONS FOR SUSPENSION OF ITS INITIAL TARIFF, I.C.C. NO. 742, SUPPLEMENT NO. 1, FOR THE TRANSPORTATION OF PETROLEUM FROM PRUDHOE BAY, ALASKA TO VALDEZ, ALASKA VIA THE TRANSALASKA PIPELINE SYSTEM

This is a reply to each of the protests and petitions for suspension which have been filed with respect to Sohio Pipe Line Company's initial tariff, I.C.C. No. 742, Supplement No. 1.[1] Each of the protests are based upon the erroneous premise that the Commission's decision whether to suspend initial rates pending investigation of their reasonableness requires the resolution of hotly contested issues of fact and theories of regulation. In addition, the Department of Justice appears to be under the erroneous impression that the burden of proof is on the carriers to establish the reasonableness of the initial rates on pain of suspension. The Department in fact suggests (pages 8-9 of its Protest and Petition) that the terms of the statute (49 U.S.C. § 15(7)) and the decisions of the Supreme Court of the United States provide that if the proposed rate is challenged before it goes into effect, that the carriers must

1. The specific protests and petitions to which this reply is addressed are those of the State of Alaska; the Department of Justice, Antitrust Division; the Bureau of Investigation and Enforcement of the Interstate Commerce Commission; and the Arctic Slope Regional Corporation.

"establish that the rate meets statutory standards." Of course neither the statute nor any decision of the Supreme Court of the United States provides any such thing. At this stage of the proceedings before the Interstate Commerce Commission the justness and reasonableness of the rates are not at issue except as the matter must be prima facie considered to determine whether petitioners have shown that an investigation is required. The attempt to divert the Commission into consideration now of difficult, complex and hotly contested issues as to valuation, alleged mismanagement of the project, fair rate of return and theories or regulation simply avoids arguing the real questions now before the Commission. The Commission cannot now, and certainly is not supposed to, decide whether the proposed rates are reasonable as it would have decided if it enforces lower rates pending investigation. Rather, the question is, if it appears that the initial rates may, after hearing turn out to have been too high and thus an investigation by the Commission is required, are there substantial interests which would be irreparably injured by permitting the filed rates to go in effect without suspension which outweigh the certain irreparable injury that suspension would impose on the pipeline carriers should it turn out, after investigation and hearing, that the filed rates are just and reasonable and conform to the Act. In *United States* v. *Chesapeake & O. Ry. Co.*, 426 U.S. 500 (1976) the court said (page 513), addressing the power of suspension given the Commission in § 15(7), that "Its purpose was to protect the public from the irreparable harm resulting in unjustified increases in transportation costs. . . ." The court cited with approval (footnote 10) the statement in S. Rep. No. 94-499 p. 13 (1975) that the suspension power is to protect the public interest because while shippers can

secure a refund consumers have no such remedy. We submit that the need for suspension to avoid irreparable injury is the only question appropriately addressed in this proceeding at this stage.

Neither the State of Alaska nor the shippers nor the Arctic Slope Regional Corporation nor the consuming public will be irreparably injured by permitting the rates to go into effect as filed on the specified dates. Suspension of the rates with the consequent suspension of service would impose massive economic injury on all the parties to this action and to the general public. Forcing lower rates pending the investigation by the threat of imposing such massive injury through suspension would gain nothing for the petitioners or the public that they cannot obtain without it.

Petitioners would have the Commission, like some bureaucratic godfather, make the pipeline companies an offer they cannot refuse. We submit that it would be morally wrong and plainly illegal for the Commission to embark on any such enterprise no matter what circumlocution it may be clothed in.

1. The Sole Question Before The Commission Is A Balancing Of Equities Pending Further Investigation.

The Commission's rules of practice respecting proceedings relative to suspension (49 CFR § 1100.200) provide that they shall be informal, that no transcription will be made, that subpoenas will not be issued and oaths will not be administered. Yet the petitioners would have the Commission consider, at this preliminary stage, issues both of fact and law that are extremely complex.

The TransAlaska Pipeline System (TAPS) was a project of unprecedented difficulty and complexity. Massive in-

vestigations relating principally to the cost of the project are in progress by the State of Alaska, the Staff of the Interstate Commerce Commission, and the General Accounting Office. They give promise of continuing for an extended period. We gather that these agencies believe they have to date only scratched the surface. We are met here with accusations of mismanagement and waste and sweeping conclusions of fact based upon an admittedly partial investigation. We are presented with hundreds of pages of out-of-context quotations and paraphrases from construction files. Any attempt to make a meaningful response on the merits of these accusations would bog down this proceeding in a morass of issues not yet ripe for decision and which, in any event, must be based upon facts which are unknown and, in the time frame involved, unknowable.

Only the full time to develop the relevant facts will answer the questions being asked by petitioners. Indeed, a piecemeal picture cannot display the difficult construction decisions that had to be made on a continuing basis during the largest private construction project in history under exceedingly difficult conditions, which is perhaps the perspective from which the questions raised must be viewed.

The other contentions of the protestants have to do with the theory of regulation and include such questions as what is an appropriate rate of return, whether the rate base should be determined by present commission practice or by some other method and how taxes shall be reflected. These matters are the subject of extensive testimonial filings and arguments in *Ex Parte 308* which has been pending for some time and hearings in which are now set to begin on August 16 of this year. These are questions which this Commission believed should not be decided in a specific litigated case even after a full hearing because of their

novelty, their applicability to all pipelines and because of the pendancy of *Ex Parte 308. Petroleum Products, Williams Brothers Pipe Line Company,* Docket No. 35533, Division 2, 351 I.C.C. 102 (1975) and full Commission pp. 6-8 (December 3, 1976). Yet these protestants would have this Commission decide these questions now or perhaps, more accurately, decide this proceeding as if *Ex Parte 308* and any investigation of these rates (which the Commission may well order) had already come out as they, apparently, wish. It is plain that the coercion of a rate much lower than that filed, as demanded by petitioners, would be, in fact, a final decision. The suggestion that the Commission should deal with these massive economic issues in so cavalier a fashion without evidence and without hearing, impugns the integrity of the decisional process of this Commission.

This power of the Commission to suspend takes the place of the power theretofore existing in the district courts of the United States to enjoin rates claimed to be unlawful and improper (*Arrow Transportation Company* v. *Southern Ry.*, 372 U.S. 658 (1963)). The question before this Commission therefore is not dissimilar to that before a United States District Judge in determining whether to issue a preliminary injunction.

In *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973), the Court, giving consideration to the factors which should govern a reviewing court in determining whether to enjoin an order of the Commission pending decision, stated as follows (pages 823-24):

> In addition, the reviewing court must consider whether irreparable harm will result if the injunction is not issued and the party seeking it prevails on the merits. *Order of Conductors* v. *Pitney, supra.*

> That too many interfere with the agency's primary jurisdiction. We deal here with a dispute between shippers and carriers. In giving the Interstate Commerce Commission power to suspend proposed rate increases, Congress allocated the benefit and harm of suspension. For a period of up to seven months, the carriers may not collect the increases if the Commission suspends them. The income that they might have gained is lost to them forever. Congress did provide protection to shippers for the period after the rates go into effect. The Commission may require carriers to keep detailed accounts of the income received as a result of the increase. If the increase is ultimately found unjustified, the Commission may order a refund. 49 U.S.C. § 15(7). Even if the Commission does not do so in a suspension proceeding, the shippers may recover reparations under some circumstances. 40 U.S.C. §§ 8, 9. Thus, it is often quite unlikely that shippers will be irreparably damaged by the implementation of a rate increase.

In *Samson* v. *Murry,* 415 U.S. 61 (1974), the Court held that a district court has no power to grant an injunction without a showing of irreparable injury pointing out that (page 88):

> . . . the record before us indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted to the district court did not touch in any way upon considerations relevant to irreparable injury.

Here no attempt has been made by the petitioners to address the question of *irreparable* injury.

2. No Irreparable Economic Injury Will Result To Petitioners Or To Consumers From Permitting The Rate To Go Into Effect Without Suspension.

Central to the consideration of the merits of suspension is the specific economic effect at this time of the TAPS tariff. We do not think it is disputed that the applicable Federal ceiling price of oil at the wellhead (over $11.00 per barrel) is such that the wellhead value in the case of Prudhoe Bay, Alaska is determined by the competitive world price of oil in the lower 48 states which is now approximately $13.50 per barrel. Transportation costs, including tanker costs, would have to be substantially less than $3.00 per barrel for the ceiling price to have any effect. Thus, the market price of the oil will be fixed by competition and will not be affected by the tariff level. The value of the oil at the wellhead at Prudhoe Bay is the "netback" from the sale price of the oil at destination—*i.e.*, the price at destination minus the cost of getting it there. See affidavit of T.C. Roth attached hereto. Thus, the level of the pipeline tariff has a direct effect on the wellhead value of oil at Prudhoe Bay but no effect whatsoever on the price of oil to refineries or the price of petroleum products to the public.

This is simply a contest among the state, primarily as a proprietor, and a few oil pipelines and producers as to how the sale price of the oil shall be divided up and incident to that, the return on the risks undertaken to finance, build, operate and maintain the first large diameter pipeline of its kind. In another sense it is a contest as to what contribution the State of Alaska shall make in its proprietary capacity to the cost of getting the oil to market. If the tariffs are allowed to go into effect pending examination

of the questions raised by petitioners and the Commission shall later find any of the rates to have been too high, indicated economic inbalances including those of the State's interests, can be retroactively adjusted through Sections 8 and 9 of the Interstate Commerce Act or by the Commission (or even by agreement). If, as the petitioners demand, the Commission imposes a lower rate pending its investigation and hearings, any resulting error cannot be remedied. It will have made, in fact, a final determination. The case is exactly like that outlined in the quotation from *Atchison, T. & S. F. Ry.* v. *Witchita Board of Trade, supra,* set out at page 5 above. Thus, the equities between the parties require that the rates become effective as filed and we submit there are no "public interest" considerations requiring a different treatment.

Ordinarily rates and practices involved in proceedings before a regulatory tribunal affect the price which the public will pay for the commodity or service involved either directly or indirectly through its incorporation in other articles or services provided to the public. This is usually the public interest which the tribunal considering suspension or a court considering an application for temporary injunction, must weigh against the possible irreparable injury to the carrier. Shippers may recover for their damage under §§ 8 and 9 of the Interstate Commerce Act, but ordinarily customers of the shippers and others down the distribution line from there who, perhaps, pay higher prices because of the increased cost of shipment may not. See *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918). This is not because the statute forbids it. The statute says (49 U.S.C. § 8) that in case any carrier shall do anything prohibited by the Interstate Commerce Act, the carrier shall, in language very like § 4 of the Clay-

ton Act (15 U.S.C. § 15), be liable "to the person or persons injured thereby" for the damages sustained. Rather, it is because of the practical problems of proof and the virtually impossible litigation management problem that would be presented thereby. *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co., supra. Illinois Brick Co.* v. *State of Illinois,* 45 L.W. 4611 (U.S. Sup. Ct. No. 76-404, June 9, 1977).

The level of the pipeline tariff has a direct effect, dollar for dollar, on the wellhead value of the oil and no other direct effect. This is not distinguishable from the situation of the customer of a shipper with a cost plus contract. See *Illinois Brick Co., supra,* at 4615 and note 16. *Cf. Arrow Transportation Co.* v. *Southern Ry.,* 372 U.S. 658, 669 (1963) suggesting that a competitor damaged by too low a rate may have a cause of action under § 8 of the Act.

The amount and placement of the economic effect of a change in the tariff depends upon the interrelationship of the affected parties and the differences in interest are not clearcut. The State of Alaska owns (as royalty owner) 12½ percent of all the oil.[2] Thus, it pays the tariff either as a shipper or through the effect of the tariff on the sale price of oil at the well.

The other interests are (a) the private shippers of oil and (b) the pipelines. If a shipper of oil ships all of its oil over a wholly owned subsidiary pipeline and it is the sole shipper, then it should theoretically be indifferent to the tariff except as it may impact on its severance tax. Operating under this theoretical assumption the Arctic Slope Regional Corporation suggests that the carriers and their affiliated producers will merely shift back and forth among themselves any gain or loss resulting from tariff adjustment. However, the situation is not that simple. Sohio Petroleum Company is entitled to about 53 percent of the production of the field but its affiliate, Sohio Pipe Line Company, owns 33 percent of the pipeline. There is no way The Standard Oil Company could profit from a high tariff.[3] BP Pipelines and Union Alaska own pipeline but their parents own no oil. There are others who own oil but no pipeline. Moreover, for these and other reasons, the owner of oil which has a pipeline subsidiary will not necessarily ship over it. However, no matter what the economic relationships, they can clearly be retroactively readjusted should the tariff be readjusted under the provisions of the Interstate Commerce Act.[4]

We submit that there simply is and can be *no irreparable* injury to any presently perceived economic interest if upon consideration, after the investigation and hearings to be held, the Commission should determine that the pipeline tariffs, or any of them, should be lower than those now on file.

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2. It also is interested, through its 12¼ percent severance tax, in the wellhead value of the other ⅞ of the oil. However, it has imposed a "floor" on the tax of $.80 per barrel which is equivalent to its percentage tax on a $6.53 wellhead value. Thus, its initial loss in severance tax, if any, is mitigated and in any event such loss, if there be any, if not recoverable under the statute (§8) is subject to state laws relative to recovery of back taxes—a matter within Alaska's control.

3. It has a major interest, however, in allocating costs where they belong and in insuring that investors will, in the future, supply the money to build high-risk pipelines to transport oil discovered in places difficult of access.

4. The Arctic Slope Regional Corporation shows that the present value of its entitlement to a large sum to be paid by the State of Alaska out of the latter's oil royalties would be diminished by any stretch out of such payments caused by an unreasonably high tariff. This shows an 8½ percent decrease over 14 years from a $1 increase in tariff. This is only six tenths of one percent per year and we deal here with a rate pending further decision. In any event even if such "damages" were too remote for direct recovery under the Act, the Regional Corporation would automatically receive their share of any augmenting of the royalty fund recovered by the State.

3. Petitioners Have Not Sustained The Burden Of Showing That There Are Any Interests Which Require The Suspension Of The Tariffs.

The Department of Justice asserts that "the Supreme Court has interpreted § 15(7) to mean that when a proposed rate is challenged before it goes into effect, the carrier must establish that the rate meets statutory standards." The erroneous impression held by the Department of Justice may perhaps explain why it dealt almost entirely with questions to be decided by the Commission not in this informal hearing but after hearing the evidence and making findings on the merits after hearing.

So far as we can ascertain there is no decision of any court which has anything to say about the burden of proof on a petition to suspend. The only reference to burden of proof in § 15(7) of the Act is in the next to last sentence thereof which provides:

> At any hearing involving a *change* . . . the burden of proof shall be upon the carrier to show that the proposed [change] . . . is just and reasonable. (emphasis added).

This proceeding, of course, does not involve any change. Indeed, even the brief of the State of Alaska, which is not notable for the restraint with which it makes claims or interprets the statutes and cases, points out that the burden of proof language of the statute refers only to a change in rate as distinguished from an initial rate. (page 18) The Bureau of Investigation also correctly treats burden of proof (pp. 34-35). We suppose we need not belabor this point because the distinction in the burden of proof between an initial rate and a change in rate is well settled in the

practice of this Commission. We note that in its "Summary of Pipeline Regulatory Provisions and Procedures of Interests With Respect To Initial Tariffs Of The Trans-Alaska Pipeline System" issued by this Commission's Office of Proceedings and Section of Rates, dated April 18, 1977, it is stated:

> When initial rates are involved, those challenging the rates have the burden of proof. *Rail-Water, Grain in Bulk, Mo. Ill., and Ind. to Buffalo,* 321 I.C.C. 564 (1963).

The cases cited in footnote 13, page 9, of the Government's brief simply do not hold what the brief says they hold.

In *Atchison, T. & S.F. Ry.* v. *United States,* 279 U.S. 768, 773 (1929), the Court said:

> Since the proposed tariff involved an increase in the rate, the burden of justifying the increase before the Commission was imposed upon the carrier by paragraph 7 of Section 15, if applicable.

In that case the Santa Fe filed an increase which was initially suspended by the Commission and then extensive hearings were held and the increase was denied. The Santa Fe had made no attempt to justify the increase as an increase in rates claiming that on certain technical grounds the Commission had no power to deny the increase.

The quotation from *Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 814 (1973), set out by the Justice Department at the top of page 9 of its brief is grossly misleading. In the first place, the matter quoted on page 814 is not a holding of the Court, but is a part of an analysis by Justice Marshall of the statutory framework within which the Commission was constrained in determin-

ing the reasonableness of rates. The case involved a rate change and it involved a review of the Commission's decision made after full hearing not upon a petition for suspension. As Justice Marshall noted at the beginning of his opinion, the Supreme Court had noted probable jurisdiction to resolve two important questions relating to the proper role of the courts in reviewing approval by the Interstate Commerce Commission of "proposed rate increases by railroads." One of the important considerations in the case was whether the Commission should fully try out the justness and reasonableness of the proposed increase in the proceeding involving the proposed increase or could remit claims regarding specific rates to suits by shippers for reparations. At page 812 it was noted that in a reparations proceeding "the shipper must show that the rate charged was unreasonable." And then stated at page 813 "In contrast, when a proposed rate increase is challenged by a shipper before it goes into affect, 'the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable.' 49 U.S.C. § 15(7)." Thus, Mr. Justice Marshall clearly read the statute the same way the Commission reads it. Moreover, this all refers to the burden of proof in proceedings to determine the reasonableness of a rate—not proceedings to decide whether there shall be suspension pending such a hearing.

As we have noted above, the briefs of the Department of Justice, the State of Alaska and the Bureau of Investigation and Enforcement are devoted almost entirely to the merits of the reasonableness of the rates submitted, a question which surely this Commission must decide after hearing the evidence from both sides as distinguished from the aggressive overstatements of counsel. While petitioners devote much time to a discussion of their view of the merits,

they give little time to the real issue before this Commission which is whether the public interest requires that these rates be suspended pending a determination of the merits.

Of course, in any matter involving an appeal to a tribunal for an interlocutory injunction or suspension pending a determination of the merits of a claim, at least a preliminary determination must be made of the likelihood that petitioners will succeed on the merits. This does not, of itself, warrant the issuance of an injunction or a suspension because otherwise it would simply be a prejudgment of the merits. One gains the impression that this is exactly what the petitioners seek. Quite clearly, however, in order to warrant the suspension the petitioners must show harm to the interests represented by them which outweighs the heavy damage that would be visited upon the pipeline companies in the event the decision, here to be made by the Commission on 3 days' notice and without hearing the evidence, turns out to be erroneous.

We have shown above that neither petitioners nor consumers can be irreparably injured by permitting the tariffs to become effective pending review. However, the Department of Justice alludes in part VI at page 7 of its brief to a claim that "unreasonably high transportation rates restrict output and prevent the realization of cost savings derived from the large economies of scale associated with pipelines." It suggests that unreasonably high transportation rates discourage exploration and development of new fields by reducing the wellhead value of crude oil and thereby decreasing returns on production. They suggest that rates such as those proposed here would unnecessarily impair incentives to exploration for new sources of crude oil.

The State of Alaska, at pages 22 and 23 of its brief, makes the same point. It surely is true that the minimization of return will discourage exploration for new sources

of oil and it surely is also true, that the imposition of unreasonable financial burdens on the exploitation of new discoveries will discourage such search and exploitation. The claims that this truism warrants the imposition of the heavy economic loss implicit in suspending (pending determination of reasonable rates) the initial rates of the TAPS pipeline carriers or imposing lower rates defies reply because it is not supported by analysis.

The position of the State of Alaska as a petitioner herein must be understood in terms of its own self interest which it is advocating. It owns one-eighth of all of the oil produced at Prudhoe Bay. In addition, in the years since the discovery at Prudhoe Bay was made, it has imposed a variety of taxes—severance tax, income tax, *ad valorem* taxes—which create an overall tax burden that equals or exceed all other leading oil producing states in the United States today. The results of this tax structure has been projected by the Commissioner of Revenue in Alaska to create a surplus in the state treasury after all bills are paid of 8½ billion dollars by the year 1985. This is more than $23,000 for every man, woman and child resident in the state—three times the per capital income. In addition, during these interim years, the State exacted, through an *ad valorem* tax on oil in the ground, an interest-free advance on severance taxes totaling 500 million dollars to carry it through its deficit period during the last two years. What's more, the State received a few years ago nearly a billion dollars for the mere right to explore for more oil. If the development of the energy resources of the Arctic are restrained, it is not by the cost of transport.

In any event, any restraint on exploration by pipeline rates herein does not threaten irreparable injury in any time period involved here. The consequences of excessive

burdens on explorations and exploitation could be serious but they are long range. Moreover, lest it be thought that absent some interim reduction in transportation charges pending consideration by the Commission whether in fact these charges are unreasonable, the State of Alaska will suffer some temporary deprivation, it should be noted that the State of Alaska will receive from this oil at the tariff proposed by Sohio approximately $900,000,000 (in royalty and tax revenue) in 1978, well over $2400 for each and every one of the 365,000 men, women and children resident in that State.

We submit that it is plain that there has been no showing of any real threat of irreparable injury to the interest of any petitioner or to the public interest as it may be claimed to be represented by the Department of Justice of the United States. We note, however, that its view of the public interest here involved seems rather narrow. To talk in one breath about the national energy policy requirement that there be an inducement to the development of natural resources, particularly energy resources, and at the same time to contend for the practical elimination of any incentive to build and operate a pipeline under the most adverse conditions known to man, strikes us as somewhat inconsistent.

Although we believe that the merits of the tariff level and the factors which control it are not issues before this Commission at this time, the unjustified expressions of outrage and overstatements of fact made by some petitioners require some answer.

4. The Proposed Rates Do Not Reflect Unreasonable Rates of Return.

Most of the pipeline companies involved in this proceeding are restrained by the terms of a consent decree which

prevent the receipt of dividends by the parent companies of the pipeline companies in excess of 7 percent of the I.C.C. valuation and thus implicitly restrict the earnings of the pipeline companies available to stockholders to 7 percent of such valuation. *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959). Entirely apart from any question of reasonableness, this decree is a restriction under which the pipeline companies operate and which these companies must observe in fixing tariffs. As some of the petitioners point out, the constraint of the consent decree has no necessary relationship in 1977 to a reasonable rate for a common carrier pipeline through the Arctic waste of the North American continent. By that decree the Department of Justice agreed that receipt of pipeline earnings by shipper-owners of 7 percent or less of the valuation of the pipeline would not constitute a rebate under the Elkins Act. It is implicit in this agreement that profits not in excess of 7 percent on I.C.C. valuation *prima facie* reflect a rate which is not unreasonable. We submit that for purposes of the consideration of whether the proposed rate is *prima facie* too high, the fact that it comes within the constraints of the consent decree should be dispositive.

The claims of the petitioners all turn about disagreement with the economic results of the consent decree under present conditions and an attempt to convince this Commission that under theories espoused by them, the pipeline companies will receive "exorbitant" returns on their "equity" investment. This is another red herring and simply does not deal with the economic facts of life.

The question whether regulation of the rates of common carrier pipelines, particularly those pipeline companies that are subject to the constraint of the consent decree, should be based upon the earnings of the pipeline companies available to shareholders or whether public utility modes of

regulation which would place any interest cost below the line and deal with total returns available for capital, is a question which presumably will be decided by this Commission in a rulemaking in *Ex Parte 308* or elsewhere. There is much to be said for having rates of pipeline carriers consistent with consent decree standards. The modes of regulation suitable for gas and electric utilities are not necessarily suitable for common carrier oil pipelines, particularly where the preservation of incentives for the exploitation of almost inaccessible resources is, as shown by the Department of Justice, an important facet of national energy policy.

But these are not questions to be decided upon on three days' consideration in a suspension proceeding.

The Association of Oil Pipelines has filed before this Commission in *Ex Parte 308* the sworn testimony of Raymond B. Gary, a Managing Director of Morgan, Stanley and Co., who has wide experience in the actual financing of many enterprises including that of oil companies and in particular the extra-ordinarily difficult and expensive financing which Sohio Pipe Line Company and its parent, The Standard Oil Company, were compelled to undertake to finance its very large share of the TransAlaska Pipeline System. He expresses the opinion, based upon his experience and the careful study outlined in that testimony, that for a low-risk pipeline the return level required by investors under current market conditions would be 13 percent to 14 percent. This is based, incidentally, on a capital structure of 30 percent debt with a 8½ percent debt cost and 70 percent equity at 15 to 16 percent. The cost of debt to Sohio Pipe Line guaranteed by its parent in this case was 9.3 percent. Mr. Gary points out that for a higher debt ratio, in addition to a higher interest rate on debt, a higher cost of equity would have to be included to reflect the

greater concentration of the risk of the enterprise in the equity indicated thereby. In 1978 it is estimated that Sohio Pipe Line Company will earn a profit of approximately 6 percent and a return before interest expense using Mr. Gary's approach of 12.9 percent on valuation under the proposed tariff. Moreover, TAPS is clearly not a low-risk pipeline.

Now the petitioners in this case attempt to paint a kind of horror story of very large returns on equity by referring to the capitalization of the pipeline companies which in this case are all subsidiaries of oil companies. In Dr. Ileo's attachment to the State of Alaska's brief he claims in Schedule 5(c), a percentage of debt for Sohio Pipe Lines of 98.2 percent of capitalization and on page 1 of his statement he says Sohio Pipe Line Company will receive an "estimated profit rate on equity of 264 percent." We suppose that Dr. Ileo presumes to some knowledge of economics though his qualifications are not stated. We think that Dr. Ileo knows full well that in the case of Sohio (and we deal here only with Sohio Pipe Line Co.), it is the wholly owned subsidiary of The Standard Oil Company and that its debt is wholly guaranteed by The Standard Oil Company and that either by guarantee or by advances, its entire capital is provided by The Standard Oil Company. One does not have to be an economist to know that the capital costs for Sohio Pipe Line Company reflect not the perception of investors as to the risks of Sohio Pipe Line Company alone or the TransAlaska Pipeline System alone, but rather that of The Standard Oil Company as a consolidated enterprise including the chemical business, the coal business, the plastics business and the uranium business as well as the oil business. Since the financing costs reflected in the capitalization of Sohio Pipe Line Company for TAPS

reflects the risks of the consolidated business of The Standard Oil Company, not simply TAPS or the pipeline business, to suggest as Dr. Ileo does that the interest costs and other costs of capital so procured by The Standard Oil Company as a consolidated enterprise reflect the investor appraisal of the risks appropriate to determining what is a reasonable return on the value of the TransAlaska Pipeline System at the pipeline companies' capital ratio, is manifestly unfair and does not deal with the real world. To suggest that the rate of TAPS return should be limited to that earned by long-established electric or gas utilities in the populations centers of the lower 48 states, strikes us as being a little bit ridiculous. We submit that in these circumstances the suggestion of Dr. Ileo that Sohio is proposing a return of 264 percent on its investment, or even the modest recanting of this claim by the tabulation at page 37 of the brief of the State of Alaska is, we submit, not worthy of even passing consideration.

In the light of the risks involved, the realities of the financial marketplace and the need to promote the national energy policy by provision of adequate economic incentives to exploit energy resources difficult of access, the profit returns implicit in the suggested pipeline tariffs are plainly *prima facie* reasonable. Clearly they present no basis for the exercise of this Commission's power of suspension, even if the possibility of irreparable injury were shown by the petitioners which it has not been.

5. The Exaggerated Claims Respecting The Rate Base Do Not Warrant Suspension.

The question whether the Commission's long-standing practice as to valuation shall be abandoned in favor of some other method of determining rate base will be

examined in *Ex Parte 308* or elsewhere. Plainly, the results of that on-going rule-making proceeding should not be anticipated or prejudged in this informal proceeding. Similarly, it would be erroneous to anticipate here, the results of a valuation proceeding for TAPS. So we do not pause to argue this point.

The sheer bulk of paper presented by the petitioners in support of the claim that the construction of the pipeline involved waste and inefficiency and that the value should, for this reason, be written down in major degree, defies any rational attempt to deal with these claims or, more specifically the characterization of the significance of the out of context quotations presented. At the same time petitioners complain of their inability to examine vast quantities of material in addition to the thousands of pages already obtained.

It is difficult to know what to say about these claims. In this sort of situation the accuser can—and here certainly does—say what he will knowing that there is no practical way to counteract the charges and hoping to effect an invidious impression. We have here the largest private construction job ever undertaken, initiated and carried through on time, surmounting not alone bureaucractic delays and regulatory burdens probably without parallel but also the harshest climatic conditions ever confronted by a major construction project. Now swarms of accountants, lawyers and management consultants in comfortable offices pour over documents and interrogate employees in a process of second guessing (probably as unequaled in scope as the project itself), not simply to reach some balanced overview as to the efficiency with which these enormous difficulties were overcome and the validity of judgments made under pressure of time and weather, but in an atmosphere of almost vindictive prosecution.

We earnestly hope that we can look to the staff of the Interstate Commerce Commission to conduct its investigation and make its judgments based thereon with even handed regard for all of the interests involved. Good or bad, the investigations are now barely under way. The returns are not in and we submit that this proceeding is not one in which to reach any conclusion with respect to rate base.

6. The Commission Should Not Resolve Accounting Methods In This Proceeding.

Complaint is made as to the 25 year service life used for depreciation. Twenty-five years is the estimated life of the Prudhoe Bay oil field which is the only oil now available for shipment over the line. One may speculate as to whether additional oil will be discovered in areas which the pipeline can service. Certainly these pipeline companies devoutly hope that it will be. We point out, however, that the Commission's uniform system of accounts for pipelines require the application of annual percentage rates which will distribute the service value of the property by the straightline method in equal annual charges to operating expenses during the service life of the property. The service lives are to be estimated by "engineering and other studies." 49 CFR 1204, 1-8. This paragraph makes provision for the revision of the percentage rate for depreciation. Obviously neither the tariffs themselves nor the rates for depreciation are graven in bronze and each will be changed when conditions warrant. Twenty-five years is the best estimate of life at the present time. It is unsound economically, and we think contrary to the uniform system of accounts to extend estimated service by optimistic hopes of future expectations. But here again this is not a matter for decision in a sus-

pension proceeding. Similarly with respect to the treatment of taxes for tariff-making purposes, normalization is fairly standard regulatory practice and was the course of action adopted in the *William Brothers* case. We submit that this problem should not be given attention in this proceeding.

7. The Commission Has No Power To Impose Interim Rates.

All parties to these proceedings recognize that suspension of the rates without more would prohibit the initiation of transportation and would impose enormous and irreparable economic injury on many interests not the least on those of the State of Alaska. Although all of the petitioners nominally ask for the Commission to exercise its power of suspension, none of them want suspension. What they really ask the Commission to do is to impose different and lower rates than those filed by the carriers.

It is crystal clear that the Interstate Commerce Act, 49 U.S.C. § 15(7), gives no power to the Commission to impose a different rate than that proposed by the carriers pending determination of the reasonableness of the proposed rate or change in rates. The only power which the Commission has is to suspend the proposed rates pending a determination as to their reasonableness but for not longer than seven months in any event. This is a different power than the power to make some temporary reduction or change or what is the same thing to suggest that a "voluntary" fixing of some lower rate will be permitted to take effect.

Indeed, if the statute be construed to give the Commission power to impose directly or indirectly some different rate or practice pending its determination of reasonableness, it denies to the carrier the right to have any determination at all as to the reasonableness of its initial filing because the subsequent hearing, if any, would be as to the validity of the interim rate so imposed.

The brief of the Bureau of Investigation and Enforcement points out (at page 35) the obvious fact that suspension of the rates for seven months, or for any other period, "does not merely postpone increases, but rather stops all operations, and hence some rates must be allowed." We point out in passing that this fact differentiates the situation here from a suspension of a proposed change and is so different in kind as to possibly indicate an intention by Congress that the power to suspend an initial filing was not intended. In any event, the Bureau takes the position that because of the drastic consequences of suspension, the Commission may use the pressures of such consequences to impose a different and lower rate than that proposed by the carriers. The Bureau says that the Commission has often permitted the refiling of a lower rate pending the proceeding when proposed rates were ***prima facie*** unreasonable. (But citing an I.C.C. proceeding for this dating prior to the decision of the D.C. Court of Appeals in the *Moss* case and no case where its right to do so was litigated.) Recognizing, however, the problems created by the case of *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970), it proposes that the problem be avoided by the Commission makin the statement that it was not fixing rates within the meaning of *Arizona Grocery* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932). What a triumph of form over substance! The argument is especially incredible because the court in *Moss* expressly rejected such a formalistic interpretation of *Arizona Grocery*. *Moss* at 895-97. In the *Moss* case, the Civil Aeronautics Board suspended the airlines' filing for an increase in rates and then after discussions with the airlines, advised them that, if they filed new rates conform-

ing to a specified formula, such rate would not be suspended. The Court held that this was rate making and that the hearings and consideration of evidence required for rate making were not observed and thus this was an unlawful exercise of the suspension power. The severe financial pressures on the airlines were an important factor in the Court's analysis:

> As a practical matter, the Board's order amounted to the prescription of rates because, as the Board admits, the pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistable. *Moss, supra,* at 897.

The economic compulsion on the carriers (and the State of Alaska as well) to avoid suspension as in *Moss,* means that any Commission suspension order which "suggests" maximum rates will inevitably coerce the pipeline carriers to adopt the Commission rates. The realities of the situation mean that the Commission will have prescribed rates. Under 49 U.S.C. §15(1), the Commission has power to set rates only after a full hearing as to reasonableness. Thus the petitioners are asking the Commission to issue an illegal suspension order.

The Bureau would distinguish the *Moss* case because "unlike *Moss* the Commission here would in no way prejudge the outcome of its investigation of the lower rates." Well, we do not know whether the Commission would prejudge the outcome of its investigation of the lower rates or not. But it surely will have prejudged the outcome of its investigation of the rates actually filed with respect to which it exercised its suspension power. Moreover, this is not an appropriate characterization of *Moss.* In *Continental Airlines, Inc.* v. *CAB,* 522 F.2d 107, 129 (D.C. Cir. 1974), the court viewed the *Moss* case as involving "sham suspensions aimed at coercing behavior rather than merely preserving the status quo pending investigation." The proper path for the Commission in this case will, in many respects, be difficult to discern but it surely will be crystal clear if the Commission adopts the proposal of the petitioners that it will have imposed a sham suspension aimed at coercing behavior rather than merely preserving the status quo pending investigation. This, of course, puts the finger right on the significance of and the purpose of the suspension power. That is to preserve the *status quo,* keep things as they are pending investigation. No petitioner here has asked that the *status quo* be maintained—that is to say no transportation of oil. This is the last thing petitioners want. As the Bureau of Investigation says, some rates must be allowed. The only rates which may be lawfully allowed now are those now on file. It is, therefore, plain that this is not a case for the exercise by the Commission of its power of suspension.

The recent case of *United States* v. *Chesapeake & O. Ry.,* 426 U.S. 500 (1976) is relevant. There the *Commission* conditioned a non-suspension of a filed rate increase on the application of increased revenues to deferred maintenance and capital improvements. The decision was confined narrowly to the precise question presented (page 509). The question was whether by this condition the Commission was interfering in specific financial management of the railroad which it has no power to do. The Court held that this was a proper adjunct to its power to suspend pending investigation, *i.e.,* it prevented irreparable injury. The Court pointed out that the railroad did not have to accept the condition. "They had the option to continue to insist on

an unconditional increase, to submit proof of their reasonableness to the Commission, and, if successful, or if the investigation was not completed within the statutory seven month period, to collect rates based on the new tariff." (page 515). Here as all admit, *this option is not available* to the pipelines. Justices Stevens and Stewart dissented. They thought that the Commission could not lawfully impose even the narrow condition there involved.

8. The Commission May Not Lawfully Enlarge The Petitioners' Discovery Power By Conditions On Non-Suspension.

The Bureau has requested the Commission to condition non-suspension of some imposed lower than filed rate on supplying information in accordance with an elaborate 8-page specification attached to its brief as Appendix D. The Commission has elaborate regulations governing discovery. 49 CFR 1100.55-1100.67. We do not believe that the Commission may disregard its formally adopted regulations or more accurately force the carriers to agree to the Bureau's demands by threat of suspension. If this were not already plain, *U.S.* v. *Chesapeake & O. Ry., supra,* makes it so.

As to the demand that the carriers be required to comply with these special discovery demands within 30 days, we conclude that counsel who makes this demand has never been on the producing end of a document demand. Sohio Pipe Line Company physically could not meet this demand even if it were crystal clear what it called for, which it is not.

Conclusion

No one will be hurt if the Commission now follows its usual practice of permitting initial rates of new pipelines

to become effective pending investigation. It is respectfully submitted that there is no basis whatsoever—legal, moral or equitable—for this Commission to impose on the carriers rates different than those on file.

Respectfully submitted,

SOHIO PIPE LINE COMPANY

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Attorneys

Dated: June 15, 1977

Protest Reply of Sohio Pipe Line.

AFFIDAVIT

STATE OF OHIO }
COUNTY OF CUYAHOGA } ss:

T. C. Roth, upon his oath, says that he is Manager of Western Crude Oil for Sohio Petroleum Company, a wholly-owned subsidiary of The Standard Oil Company (Ohio), and that the facts hereinafter set forth are true to the best of his knowledge and belief:

The preliminary proposed federal price ceiling for Prudhoe Bay, Alaska, crude oil is over $11.00 at the wellhead. However, for the foreseeable future, the price at which Prudhoe Bay crude oil will sell to refiners and other purchasers when landed on the West and Gulf Coasts of the lower 48 states will be governed by the price of competing sources of crude oil, principally imported crude. At the present time, the approximate price of imported crude of similar quality delivered on the West Coast is $13.00 to $13.50 per barrel. Adjusting that price for differences in quality of Prudhoe Bay crude, the latter would sell for about $12.50 to $13.00 per barrel delivered on the West Coast.

The value at the wellhead of such Prudhoe Bay crude oil would consist of its West Coast delivered price less the costs incurred in the course of transporting the crude from the wellhead to the point of delivery on the West Coast. Using the aforesaid delivered West Coast price range, and assuming a pipeline system tariff of $6.16, a marine transportation cost of $.80 to $1.00 and a fee of $.05 per barrel for payment of the TAPS Liability Fund fee, the wellhead value of a barrel of crude would be about $5.30 to $6.00. If the delivered price of foreign crude oil should vary, the

Protest Reply of Sohio Pipe Line.

wellhead value of Prudhoe Bay crude will vary accordingly, assuming all other elements of the calculation remain the same.

With respect to Prudhoe Bay crude delivered to destinations on the Gulf Coast, the above principles would control. However, foreign crude presently sells for a delivered price on the Gulf Coast of $13.30 to $13.80 per barrel and the cost of transporting North Slope crude from Valdez to destinations on the Gulf Coast is about $3.20 to $3.60 per barrel, resulting in a wellhead value of about $3.50 to $4.40 per barrel.

T. C. ROTH

Sworn to and subscribed before me this 21st day of June, 1977.

GAIL A. WUTZ
Notary Public
GAIL A. WUTZ
Notary Public For Cuyahoga County, O.
My Commission Expires 10/30/78

[Certificate omitted in printing]

Petition of Exxon Pipeline Company for Reconsideration, July 8, 1977.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

[Caption Omitted]

PETITION OF EXXON PIPELINE COMPANY FOR RECONSIDERATION

Pursuant to Commission Rule 101, 49 C.F.R. § 1100.101, Exxon Pipeline Company (Exxon) hereby petitions the Interstate Commerce Commission for reconsideration of its June 28, 1977 Order in the above entitled proceeding and respectfully requests that the Commission modify that Order as it applies to Exxon Pipeline Company. As set forth in detail herein, the Commission's Order is based upon a number of erroneous factual and legal assumptions which, even if the Commissions major premises are accepted on judicial review, must be corrected.

PRELIMINARY STATEMENT

On June 8, 1977, Exxon filed a tariff setting forth an initial rate of $6.27 per barrel to apply to Exxon's transportation of crude oil through the Trans-Alaska Pipeline System (TAPS). Various protests and petitions for suspension and investigation were filed with the Commission on June 15, 1977, to which Exxon and the other joint owners of TAPS responded on June 22, 1977. Following oral argument on June 27, 1977, the Commission, on June 28, 1977, issued the Order which is the subject of this petition.*

* This Order was amended on June 29, 1977, in a "Correction Notice," purporting to cure certain "inadvertent omissions and typographical errors." One of the "omissions and typographical errors" "corrected" required the deletion of three sentences evidencing that the order was based in part on the Commission's views concerning the appropriate return on equity rather than return on valuation, a total departure from past Commission practice.

Petition for reconsideration, Exxon Pipeline.

In its Order, the Commission, *inter alia,* (1) suspended the operation of Exxon's tariff schedule, I.C.C. No. 125, from June 30, 1977, to and including January 29, 1978; (2) ordered an investigation of the lawfulness of the rate contained in Exxon's suspended rate schedule and of the lower interim rate authorized by the Commission; (3) authorized Exxon to file, upon not less than one day's notice, an interim rate not exceeding $5.10 per barrel; (4) ordered that any interim tariff contain a refund provision to the effect that if the interim rate charged exceeds the rate subsequently authorized or prescribed by the Commission, the carrier will refund the difference between the rates with interest; and (5) ordered that the pipeline carriers file, effective on not less than one day's notice, a similar refund provision applicable to the original proposed rates.

The Commission found that, contrary to the contentions of various of the TAPS owners, it had the power to suspend an initial rate, even though the consequences of such suspension could be to preclude any transportation service; that it had the power to establish an "interim rate" without a full hearing, even though the consequences of establishing a rate which was less than the rate finally found to be just and reasonable would be permanently to deprive the carriers of revenues to which they were lawfully entitled; that a method of measuring return, adopted only in a single case, represented the Commission's "historic" method of calculating return, even though Exxon, for one, had been filing rates justified on a different method of calculating return for over 35 years, with the full knowledge of the Commission and without objection from the Commission; and that it could impose refund conditions with respect to

initial rates, even though Section 15(7) of the Act expressly limits this power to *increased* rates.*

This petition, however, does not seek reconsideration of these matters. It is Exxon's position that these fundamental issues were a proper subject for judicial review. In this petition, Exxon, without waiving its right to seek judicial review of such issues, seeks only to direct the Commission's attention to other matters which also render its order unlawful.

It is the position of Exxon that even if the underlying premises of its order are sustained, the Commission erred in the following respects in its June 28, 1977 Order:

1. In determining its lower interim rates, the Commission erroneously based its calculations on the assumption that the throughput for the Trans-Alaska Pipeline during the seven-month interim period will be 1.2 million barrels a day, the current maximum design capacity of TAPS when it is in full operation. (Order, p.5; Appendix 2). To the contrary, the average throughput during the seven-month period when the authorized interim rates would be in effect is anticipated to average no more than 1.05 million barrels a day. As shown below, this error alone makes the proposed interim rates manifestly unreasonable.

2. In estimating the restoration and removal costs which Exxon and the other carriers will incur, the Commission allowed an annual amount calculated by dividing such costs expressed in 1977 dollars by

* It is obvious that a refund condition with respect to an initial rate is far more burdensome than in the case of an increased rate. For an initial rate, a refund condition places the total rate in jeopardy; for an increased rate such a condition applies only to the amount of the increase, and not to the underlying rate.

the 25-year life of the pipeline, wholly ignoring both inflation and the effect of income taxes which must be paid by the carriers on both the funds received and earnings from investment of such funds (Order, p. 6; Appendix 2). By the Commission's own admission, the elimination of an allowance for inflation alone means that this approach understates the amounts that the carriers must accrue; the failure to recognize that these funds are taxable when received and that any earnings on the funds are also taxable grossly magnifies this understatement, and consequently results in an unreasonably low interim rate.

3. Despite a substantial showing by the carriers that a higher return on valuation is justified when interest expense is included in overall return the Commission erroneously and with no justification concluded that a 10 percent return on valuation is appropriate for the TAPS carriers (Order, p. 7). The weight of the evidence before the Commission clearly shows that a higher return on valuation is justified for the TAPS carriers and the Commission had no basis for applying an unrealistic 10% standard to compute proposed interim rates. Moreover, when recognition is given to the reduced throughput achievable in the seven-month period, the $5.10 interim rates does not result in a 10% return, using the Commission's proposed methodology, but instead produces a return of only 8.6%.

In view of these errors Exxon respectfully submits that, at a minimum, the Commission should reconsider its decision in this proceeding and modify its Order in the following manner:

The Commission's determination of an interim rate for Exxon should be based upon: (a) the actual estimated throughput for the seven-month period during which the interim rate would be in effect; (b) a reasonable estimate of restoration and removal costs which includes an allowance for inflation and taxes; and (c) a reasonable rate of return on valuation.

ARGUMENT

I. The Commission Erroneously Based Its Determination Of A Lower Interim Rate On Excessive Estimates Of Throughput During The Interim Period

In its Order, the Commission stated the following (p. 5):

> "The process of arriving at an acceptable interim rate requires two steps. The first is to define the basic carrier data that will be employed, and the second is to perform computations using such data.
>
> "The data that we will employ is set forth in Appendix 2. For the purposes of the present decision, we have, for the most part, employed the figures supplied by the carriers. Appendix 2 displays this data both in total dollars and in dollars per barrel. The conversion to per-barrel figures is based on the assumption that *the normal traffic volume for the beginning years will be 438 million barrels a year (1.2 million barrels a day)*, and that this number will be apportioned among the carriers according to their respective ownership shares in the pipeline." (Emphasis added.)

Thus, using 1.2 million barrels a day as a base, the Commission calculated operating costs, removal costs, depreciation, etc., on a per barrel basis in Appendix 2 and then used the Appendix 2 figures to calculate the proposed interim rate for Exxon of $5.10 per barrel in Appendix 5.

By calculating its proposed interim rate in this manner, the Commission has committed a fundamental error:

Using design capacity figures for system operation during 1978 and following years, the Commission has calculated a rate that will have application, if at all, between July 1977 and January 1978. The result is to grossly overstate the amount of revenue and thus, overstate the return that Exxon will receive if the interim rate of $5.10 per barrel is accepted. A further result of the Commission's error is the anomalous situation in which Exxon receives a lower rate when its costs per barrel are highest. As shown in detail in the verified statement of Ernest C. Terry, attached as Appendix A to Exxon's Reply to Protests, filed June 22, 1977, in computing its $6.27 rate, Exxon did not utilize any 1977 data (App. A, p. 6). As Mr. Terry stated:

> "Because of the uncertainty of initial throughput and operating conditions through year end 1977, a rate based on 1977 was not calculated. A comparable rate for that period would be higher than a tariff rate during a full year of operation."

The $6.27 rate was calculated on the basis of the average design capacity for the years 1978-1981 of 1.24 million barrels per day, reflecting an anticipated expansion in 1981. Mr. Terry did, however, present a forecast of 1977 financial results, estimating throughput for the portion of 1977 in which the pipeline would be operating of 90% of capacity and for 1978 estimating throughput of 95% of capacity to

make due allowance for the uncertainties of start-up, operating conditions, and other factors (App. A, p. 12 and Attachment VII). The anticipated throughput is shown in detail on Table 1 on page 9. The 1977 and 1978 forecasts provide the necessary expense figures and throughput data to permit calculation of a rate for the period July 1, 1977, through January 29, 1978, the period in which the Commission would have its $5.10 interim rate apply.

Using a realistic estimate for throughput during 1977, and January, 1978, Exxon's estimated cost per barrel, before return, assuming *arguendo* all of the Commission's other assumptions are proper, becomes $3.22 per barrel, as compared with the $2.89 calculated by the Commission. Applying the Commission's proposed interim rate of $5.10 per barrel, Exxon's return on valuation, as return is calculated by the Commission in this proceeding, would amount to a mere 8.8%, far below the 10% rate of return which the Commission has found to be acceptable for an interim rate.

On the basis of the Commission's own standards as expressed in this proceeding, i.e., 10% return on valuation, inclusion of interest expense as an element of return, and no allowance for inflation or taxes in calculating removal costs, the minimum interim rate for Exxon during the period from June 30, 1977 to January 29, 1978 should be $5.74 per barrel as shown in Table 2 on page 10.

TABLE 1

Exxon Pipeline Company TAPS Anticipated Revenue Barrels July 26, 1977 Through January 29, 1978

Scheduled Throughput

Date	Thousand Barrels
7-26	128
7-27	160
7-28	176
7-29	182
7-30	182
7-31	185
8-1	185
8-2	190
8-3	195
8-4	200
8-5	205
8-6	210
8-7	215
8-8	220
8-9	225
8-10	230
8-11	235
8-12	240
8-13 through 12-31-77	33,840
Total	37,403
Less: 10% for TAPS downtime, fuel and other factors	3,740
Working inventory in terminal tanks at 3 days throughput	720
Total Revenue Barrels Through 12-31-77	32,943
1-1-78 Through 1-29-78	6,960
Less: 5% for TAPS downtime, fuel and other factors	348
Total Revenue Barrels 1-1 through 1-29-78	6,612
Total Revenue Barrels During Period	39,555

TABLE 2

Minimum Rate for the Period June 30, 1977 through January 29, 1978 Using ICC Method Adjusted to Reflect Anticipated Throughput

	M $	$/bbl.
Return on Valuation @ 10% (includes both net income after taxes and gross interest expense)	$ 99.8	$2.520
Operating Expenses	25.8	.651
Ad Valorem Taxes	14.4	.363
Book Depreciation	36.6	.924
TAPS Dismantling	4.3	.109
Provision for Income Taxes	46.6	1.177
Total Revenue	$227.5	$5.744

If Exxon should choose to file an interim rate at the level authorized by the Commission, it is clear that Exxon would suffer an irreparable revenue loss of not less than $25.5 million due to the Commission's error. Exxon submits that the Commission has an obligation to correct this fundamental error and adjust its proposed interim rate accordingly.

II. The Commission Erroneously Calculated Removal Costs Without Any Allowance For Inflation Or For Income Taxes On Funds Received And Reinvested By The Carriers

On pages 5 and 6 its Order, the Commission stated:

> "Of the items set forth in Appendix 2, substantial questions have been raised at this stage of the proceeding particularly with regard to removal and restoration costs and depreciation. . . .

> "For removal costs, we have used the same per-barrel allowance for each carrier, because we see no basis for cost differences among the carriers on this item. Our allowance is based on a simple amortization without inflation or discounting. While this approach may somewhat understate the amounts that need to be accrued, the magnitude of the discrepancy would not be great in terms of the overall tariff computation. It may well be outweighed by overstatement in the depreciation charges."

The Commission thus essentially adopted the approach advocated for removal costs by the Bureau of Investigations and Enforcement. As Exxon pointed out in its Reply in this proceeding (pp. 33-36), this simplistic approach has no basis in fact and makes no sense. It is a fact that Exxon is going to have to pay these removal costs. It is also a fact that Exxon will have to pay income taxes on both the funds received and the interest received from investing these funds for the purpose of paying the removal costs. And it is undeniably true that these removal costs will be subject to inflation over the next 25 years. Yet, in the face of these facts, the Commission has somehow concluded that removal costs allowed in the carriers' expenses should be calculated by simply taking the estimated total removal costs for TAPS in 1977 dollars, dividing by 25 years and dividing again by the respective carriers' proportionate share of TAPS ownership. This approach is so remote from reality that it is totally indefensible.

Exxon calculated that $16.4 million must be collected annually in order for Exxon to meet its removal obligations in 2002. In making its calculation, Exxon assumed that both the rate of escalation of costs over the 25-year period

and the rate which it can earn on the after-tax amounts invested will be 6% (also after taxes). Investment of the after-tax funds resulting from this sum will yield approximately $466 million by the year 2002, slightly less than the present estimate of Exxon's share of the total restoration and removal costs after giving full effect to the Federal tax deduction Exxon will be entitled to take when the expenditures are made.

The Commission's approach by contrast, would make available to Exxon only $8.4 million per year. Investing the sum remaining after taxes ($3.95 million) at 6% for 25 years would produce a total of only about $233 million in 2002, or only about one-half of the $466 million Exxon will require.

The Commission's treatment of removal costs is thus completely unrealistic. And it is no excuse to say that even though this treatment "may" understate the amounts needed, it "may well be outweighed" by overstatement in the depreciation charges. The Commission on one page (p. 5) concludes that the depreciation charges used by the carriers have not been shown to be wrong and then on the next page attempts to discount those charges by using them as a justification for understating removal costs. Such treatment is not only inconsistent and unfair, but it also reflects a disregard for the facts presented to the Commission with regard to removal costs and associated expenses.

In Appendices 2 and 5 of its Order, the Commission should include $16.4 million as on an annual basis removal costs for Exxon, which, when prorated on the basis of an average throughput of 211,000 barrels per day for the interim period, results in an expense of $0.205 per barrel, $0.109 higher than the figure used by the Commission. This

modification of the Commission's figures, coupled with the adjustment discussed in Section I above, indicates that any interim rate authorized for Exxon during the period from July 1977 to January 29, 1978 should be no less than $5.85 per barrel.*

III. The Commission Unjustifiably Adopted 10 Percent Return On Valuation As A Limit In Computing Its Authorized Interim Rates

In discussing its determination of authorized interim rates, the Commission wrote the following (pp. 7-8):

> "At the outset, we have questions about the appropriateness of an 8 percent return in this instance, where annual interest rates generally exceed 8 percent. The small margin of earnings in excess of interest that would result is demonstrated in Appendix 4. . . .
>
> "It should be noted that the 8 percent on valuation standard arose in the early 1940's, when capital costs were substantially lower than they are today. It could continue to provide a substantial return on original investment to established carriers, whose valuations have risen well above their actual investment because of inflation. In the case of the TAPS carriers, however, their property was constructed so recently that valuation is little higher than actual cost, and an 8 percent return on valuation becomes quite deficient.
>
> • • •

* The figures shown in Table 2 remain the same in this calculation except that the per barrel TAPS dismantling expense increases to $0.205, and the provision for income taxes is increased to $1.187, increasing total revenue required, i.e. the rate, to $5.85.

"For the purposes of the present decision, we have determined that the standard of a 10 percent return on valuation for petroleum products pipelines inappropriate for the TAPS carriers. Our selection of the 10 percent return on valuation standard is based primarily on two factors. One is that the magnitude and inherent attributes of the TAPS project produce a higher risk factor than is normal in crude oil pipeline operations. Many of the construction features are being tested for the first time. Geographic terrain, environmental and temperature problems, possible earthquakes, vulnerability to sabotage, future oil pricing policies, and regulatory uncertainty are among the factors to be considered. Moreover, a 10 percent return on valuation appears generally sufficient to cover estimated capital costs. As previously noted, an 8 percent return on valuation produces generally insufficient returns on equity.

• • •

"Although the 10 percent return on valuation appears suitable for present purposes, we stress that it is not intended to be a general standard nor to be a prejudgement of criteria to be used upon the conclusion of the investigation in these proceedings, nor is it in any way to be considered a prejudgement of the issues in Ex Parte No. 308."

The factors listed by the Commission in deciding to allow a rate of return on valuation for the TAPS carriers, on an interim basis, higher than that traditional for crude oil pipelines are impressive and unassailable. However, the Commission's determination to set the level of authorized interim rates on the basis of a flat 10% return on valuation

is contradictory to the bulk of the evidence before the Commission. The eight joint owners of TAPS filed initial rates which would result in returns on valuation, as return is calculated by the Commission, ranging from 12.4% to 13.5% (See Order, App. 3). Exxon's proposed rate of $6.27 per barrel, based on 1978-1981 estimated costs and throughput, would result in only a 12.5% return on valuation according to the Commission's own calculations. In support of that kind of return, Exxon referred to the sworn testimony of Raymond B. Gary, a Managing Director of Morgan Stanley & Co., and Dr. Ezra Solomon, Dean Witter Professor of Finance at the Graduate School of Business of Stanford University, filed in Ex Parte No. 308, *Valuation of Common Carrier Pipelines.* (Exxon Reply, App. C and D) These two witnesses, each a recognized expert in the field of finance, employed different techniques to determine the minimum overall rate of return on valuation to provide total capital needs (i.e., both debt and equity) required for a *minimum risk* oil pipeline. Mr. Gary concluded that 13-14% was minimum return on total valution for an oil pipeline today. Dr. Solomon concluded that a return on total valuation of 13 to 13½ percent was appropriate for pipelines of minimum risk.*

The various protestants simply asserted, on "historic" grounds, that, even where interest is recovered in return on valuation, the total return should be somewhere between 8% (Alaska) and 10% (Bureau).

In light of the factors requiring a higher than normal rate of return which the Commission expressly recognized and the overwhelming weight of the testimony that a

* Arco Pipe Line Company also submitted statements by two expert witnesses supporting its proposed initial tariff which would have produced a return on valuation of between 12.2 and 12.4% (*see* Arco Reply, App. D and E).

return on valuation in the range of 13-14% should be considered a *minimum,* the Commission's use of the 10% return figure in calculating its proposed interim rates is clearly unjustified. Recognizing the irreparable losses the TAPS carriers will incur if the authorized interim rates are eventually found to be too low, the more reasonable course of action for the Commission to have taken would have been to calculate interim rates, if any, on the basis of a 13-14% return on valuation, pending more detailed examination in the investigation instituted.

After making the adjustments in throughput for the interim period and removal costs, discussed in Sections I and II above, the interim rate of $5.10 for Exxon authorized by the Commission produces only an 8.6% return on valuation, a figure which by the Commission's own standards is deficient. For the seven-month period, Exxon's proposed initial rate of $6.27 per barrel results in a mere 10.8% return on valuation, still low according to the bulk of the evidence presented in this proceeding.

Exxon submits that the Commission should reconsider its determination that 10% return on valuation is adequate for the purposes of calculating interim rates and should modify its Order to reflect a return on valuation in the range of 13-14% for interim rates.

CONCLUSION

Because of the errors contained in the Commission's Order described above, Exxon respectfully submits that the Commission should reconsider its decision in this proceeding and modify its Order by authorizing an amended interim rate for Exxon.

Respectfully submitted,

EXXON PIPELINE COMPANY

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Of Counsel

Its Attorneys

[Certificate of Service Omitted]

ICC Order of July 11, 1977 Setting Case for Hearing.

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D.C., ON THE 7TH DAY OF JULY, 1977.

INVESTIGATION AND SUSPENSION DOCKET NO. 9164

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

NO. 36611
TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

By Commission orders dated June 17, 1977 and June 28, 1977, investigations were instituted in the above matters. The carriers' initial rate tariffs were suspended without prejudice to the filing of interim rates. The order dated June 28, 1977 stated that the proceedings would be handled together because of the close interrelationship of the rate filings and the applicable rules and regulations.

Upon consideration of the record, we find that this matter should be referred to an Administrative Law Judge for hearing. We further find that due and timely execution of our functions under Section 15(7) imperatively requires the omission of an initial decision by the Administrative Law Judge.

It is ordered, That the above-entitled proceedings be referred to an Administrative Law Judge for hearing commencing with a pre-hearing conference on July 19, 1977,

ICC Order.

at 9:30 a.m., Local Time, at the Offices of the Interstate Commerce Commission, Washington, D. C.

In these proceedings the Commission intends to construe liberally the discovery rules (Rules 56 through 67 [1] of the General Rules of Practice, 49 CFR 1100.56 through 1100.67). The Administrative Law Judge may find it necessary to establish special procedures and deadlines for discovery to permit the fullest possible development of the record in the public interest because of statutory time limits.

By the Commission. (Commissioner Hardin not participating)

(Seal)

H. G. Homme, Jr.
Acting Secretary

1. Rules 54-65 of the Commission's Revised Rules of Practice, which are scheduled to become effective July 19, 1977.

Supreme Court, U. S.
FILED
JAN 12 1978
MICHAEL RODAK, JR., CLERK

APPENDIX
Vol. II
Pages 596a to 789a

In The

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. and ARCO PIPE LINE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED SEPTEMBER 22, OCTOBER 12, OCTOBER 25, 1977

CERTIORARI GRANTED NOVEMBER 28, 1977

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7/ 6/77	Petition for Review of Order of ICC—*Mobil Alaska*
7/ 6/77	Flg. Petitioner's Application for Temporary Restraining Order—*Mobil Alaska*
7/ 6/77	Flg. Petitioner's Application for Interlocutory Injunction—*Mobil Alaska*
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7/ 8/77	Petition for Review of Order of ICC—*BP Pipelines*
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7/11/77	Petition for Review of Order of ICC—*Exxon Pipeline*
7/11/77	Flg. Petitioner's Motion to Stay, Restrain and Suspend Order of I.C.C.—*BP Pipelines*
7/11/77	Flg. Petitioner's Memorandum in Support of Their Motion to Stay, Restrain and Suspend Order of I.C.C.—*BP Pipelines*
7/12/77	Flg. Motion of Exxon Pipeline Co. for Expedited Consideration or, in the Alternative, for a Stay Pending Review, a Memorandum in Support and Appendices to Memorandum in Support—*Exxon Pipeline*
7/12/77	Flg. Motion of State of Alaska for Leave to Appear as Party Pursuant to 28 U.S.C. § 2323, and § 2348, and Rule 15 of FRAP—*Mobil Alaska*
7/12/77	Flg. Reply of I.C.C. in Opposition to Petitioner's Applications for Interlocutory Injunction and Temporary Restraining Order—*Mobil Alaska*

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7/13/77	Petition for Review of Order of ICC—*ARCO Pipe Line*
7/13/77	Flg. Reply of Respondent, I.C.C., in Opposition to Petitioner's Motion to Stay, Restrain and Suspend Order of I.C.C.—*BP Pipelines*
7/13/77	Flg. Memorandum in Support of Motion of Respondent, U.S.A., to Dismiss Appeal—*Mobil Alaska*
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7/14/77	Flg. Motion of Respondent, U.S.A., for Consolidation of Nos. 77-2412, 77-2421 and 77-2437 and to Dismiss Petitions —*all cases*
7/14/77	Flg. Telegram Confirmation of Interstate Commerce Commission as Requested by the Ct. with respect to earliest date projected for arrival of oil through pipeline to Valdez—*Mobil Alaska*
7/14/77	Flg. Telegram Confirmation of Mobil Alaska Pipeline Co. as Requested by Ct. with respect to earliest date projected for arrival of oil through pipeline to Valdez—*Mobil Alaska*
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DATE

7/14/77 Flg. Telegram Confirmation of ARCO Pipe Line Co. as Requested by Ct. with respect to earliest date projected for arrival of oil through pipeline to Valdez—*ARCO Pipe Line*

7/15/77 Flg. Memorandum of U.S. in Support of Their Motion to Dismiss, also fld. in Nos. 77-2412, 77-2421, and 77-2437—*all cases*

7/18/77 Flg. Mobil Alaska's Reply Memorandum in Support of Application for Temporary Restraining Order and Interlocutory Injunction and Response to Motion to Dismiss. (Copies were mailed directly to Judges' home stations.)—*Mobil Alaska*

7/18/77 Flg. Motion of Amerada Hess for Entry of Appearance as a Party—*Mobil Alaska*

7/18/77 Flg. Exxon's Reply to Motion of USA for Consolidation and Motion to Dismiss (Copies sent directly to Judges' home stations.)—*Exxon Pipeline*

7/19/77 Flg. Reply of ICC in Opposition to ARCO's Application for Interlocutory Injunction, and Exxon's Motion for Expedited Consideration (Copies sent directly to judges' home stations.)—*ARCO Pipe Line and Exxon Pipeline*

7/19/77 Flg. State of Alaska's Supplemental Memorandum in Opposition to Application for TRO and Interlocutory Injunction and in Support of Motion to Dismiss filed by Respondent U.S. (Copies sent directly to home stations.)—*all cases*

7/19/77 Minute Entry: Oral arguments were held in Houston, Texas today on Cases 77-2392, 77-2412, 77-2421 and 77-2437 on the motion to dismiss, temporary restraining order and injunctive relief. The Court granted from the bench the motion to consolidate these cases as well as the motions of all parties to intervene. The motion to dismiss and temporary restraining order and injunctive relief motions were taken with the case. The Panel consisted of Judges Brown, Godbold and Roney. Arguing for Petitioners were: 1) Andrew J. Kilcarr (Mobil Alaska); 2) Richard

DATE

J. Flynn (Exxon); 3) Marvin Schwartz (BP) and 4) Robert Jordan who handled the rebuttal (for ARCO). Arguing for Respondents were: 1) Charles H. White, Jr. (ICC); 2) Donald A. Kaplan (D. of Justice); 3) Avrum Gross (Atty. Gen., Alaska) and 3) Yale Lewis (Arctic Slope)—*Mobil Alaska*

7/22/77 Flg. Suppl. Memorandum of State of Alaska in Opposition to Memorandum in Support of Petition fld. by Intervenor, Amerada Hess Pipeline Corp.—*all cases*

7/25/77 Flg. Motion of Union Alaska Pipeline Company to Appear as a Party—*Mobil Alaska and Exxon Pipeline*

7/29/77 Opinion of Court of Appeals dismissing cases: all motions to intervene granted; all motions for stay, suspension, injunction, etc. denied—*all cases*

8/15/77 Petition for Rehearing En Banc—*BP Pipelines*

8/17/77 Received certified list of all documents submitted to ICC—*all cases*

8/19/77 Flg. Petitioner's Motion for Stay of Mandate Pending Application for Certiorari—*Exxon Pipeline*

8/19/77 Flg. Petitioner's Motion for Stay of Order of Interstate Commerce Commission pending application for certiorari—*Exxon Pipeline*

8/25/77 Flg. Response of Respondent, I.C.C., in Opposition to Motion for Stay of Order of I.C.C. pending application for certiorari—*Exxon Pipeline*

8/29/77 Flg. Memorandum of Respondent, U.S.A., in Opposition to Motion for Stay—*Exxon Pipeline*

9/ 1/77 Flg. Response of State of Alaska in Opposition to Motions of Exxon Pipeline Co. for Stay of Mandate and Stay of Order of I.C.C.—*Exxon Pipeline*

9/ 8/77 Flg. Order Denying Exxon's Motion for Stay of Mandate and Denying Exxon's Motion for Stay of ICC's order. (JRB/PHR)—*Exxon Pipeline*

9/ 8/77 Flg. Order Denying BP's Petition for Rehearing and Denying Petition for Rehearing en banc. (JRB/PHR)—*BP Pipelines*

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9/ 8/77	Judgment Issued as Mandate—*all cases*
9/26/77	Notice of Flg. of Cert. Pet. on 9-22-77—*Mobil Alaska and Exxon Pipeline*
10/17/77	Notice of Flg. of Cert. Pet. on 10-12-77—*BP Pipelines*
10/26/77	Flg. Copy of Supreme Ct. Order staying order of I.C.C. pending final disposition of petition for certiorari in Supreme Ct.—*Mobil Alaska*
11/ 1/77	Notice of Flg. of Cert. Pet. on 10-25-77—*ARCO Pipe Line*
12/ 2/77	Order of S.C. granted [certiorari] 11-28-77—*all cases*

INTERSTATE COMMERCE COMMISSION

Docket 36611

Title/Substance of Document

6/2/77 1. NOTICE: To Trans-Alaska Pipeline System owners. Requesting prompt filing of data concerning proposed rate levels and each company is asked to send a copy of its data submittal simultaneously to the State of Alaska.
[By] ROBERT L. OSWALD, Secretary (1 p.)

6/8/77 2. NOTICE: Requesting that any protests to the tariffs be filed by 6/13/77, and that replies to protests be submitted by 6/15/77.
[By] ROBERT L. OSWALD, Secretary (2 pp.)

6/13/77 3. SUPPLEMENTAL NOTICE: Advising the effective dates of tariffs filed by Sohio Pipe Line Company, BP Pipelines, Inc., and Mobil Alaska Pipeline Company have been postponed from 6/20/77 to 6/30/77, in view of these postponements, the filing dates set forth in the notice in item next above are modified, and that notice should be disregarded and requesting that protests to all of the tariffs now on file be submitted 6/15/77, and replies by 6/22/77. Parties desiring to participate in

Date

oral argument shall comply with rule 98 of the Commission's General Rules of Practice, by submitting a request for an allotment of time on or before 6/17/77.
[By] H. G. HOMME, JR., Acting Secretary (2 pp.)

6/14/77 4. PETITION: In aid of ICC Jurisdiction.
[By] STATE OF ALASKA
(by J. M. Cleary) (6 pp.)

6/15/77 5. REPLY: To the petition in item next above.
[By] SOHIO PIPE LINE COMPANY (4 pp.)

6/15/77 6. PROTEST/COMPLAINT
[By] STATE OF ALASKA
(by J. M. Cleary) (99 pp.)

6/15/77 7. PROTEST: And PETITION for Suspension and Investigation.
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT, I.C.C.
(by E. D. Greenberg) (104 pp.)

6/15/77 8. PRELIMINARY STATEMENT
[By] TERRY F. LENZNER (representing Alaska Pipeline Commission) (267 pp.)

6/15/77 9. PETITION: AND COMPLAINT for suspension of initial rates and rules for transportation of petroleum via the Trans Alaska Pipeline System (TAPS) from Prudhoe Bay, Alaska, to Valdez, Alaska, and for an investigation thereof.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (30 pp.)

6/15/77 10. PROTEST: And PETITION for suspension.
[By] UNITED STATES DEPARTMENT OF JUSTICE
(by P. J. Tomao) (29 pp.)

6/15/77 11. LETTER: Transmitting data, they believe, that the rate of earnings estimates will be produced by their initial tariff will not exceed any lawful criterion of the reasonableness of such earnings.
[By] SOHIO PIPE LINE COMPANY
(by J. T. Boltacz) (8 pp.)

Date

6/15/77 12. LETTER: Transmitting the basis for the computation of their tariff rate issued on 6/15/77.
[By] UNION ALASKA PIPELINE COMPANY
(by D. M. Schwartz) (4 pp.)

6/16/77 13. SUPPLEMENTAL PETITION: And COMPLAINT to the petition and complaint in item #13 above.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (4 pp.)

6/17/77 14. ORDER: That the petition in item #4 above is *denied.*
[By] THE COMMISSION (Commissioners Murphy, Hardin, and Christian not participating) (1 p.)

6/17/77 15. ORDER: That an investigation is instituted; that the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said schedules under the IC Act; and that the carriers parties to the schedules are made respondents to this proceeding.
[By] THE COMMISSION (Commissioners Murphy, Hardin, and Christian not participating) (2 pp.)

[Requests for oral argument time omitted]

6/17/77 21. Response to the notice in item #1 above.
[By] BP PIPELINES, INC.
(by D. A. Lucas) (23 pp.)

6/20/77 22. PROTEST: And PETITION for suspension and investigation.
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT
(by E. D. Greenberg) (3 pp.)

6/21/77 23. LETTER: Transmitting a computation of the elements making up the determination of their proposed rate level.
[By] AMERADA HESS PIPELINE CORPORATION
(by A. S. Tabor, Jr.) (10 pp.)

6/22/77 24. NOTICE: Advising time allotments for Pipeline Companies and the protestants.
[By] H. G. HOMME, JR., Acting Secretary (2 pp.)

Date

6/22/77 25. REPLY: To the protests in item #'s 6, 7, 9, 10 and 13 above.
[By] MOBIL ALASKA PIPELINE COMPANY
(by A. J. Kilcarr) (67 pp.)

6/22/77 26. REPLY: To the protests in item #'s 6, 9 and 10 above.
[By] EXXON PIPELINE COMPANY
(by R. J. Flynn) (219 pp.)

6/22/77 27. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] UNION ALASKA PIPELINE COMPANY
(by D. M. Schwartz) (25 pp.)

6/22/77 28. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] PHILLIPS ALASKA PIPELINE CORPORATION
(by R. M. Shibley) (11 pp.)

6/22/77 29. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] SOHIO PIPE LINE COMPANY
(by C. J. Lansdale) (34 pp.)

6/22/77 30. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] AMERADA HESS PIPELINE CORPORATION
(by R. Moody, Jr.) (25 pp.)

6/23/77 31. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] BP PIPELINES, INC.
(by J. Vickrey) (21 pp.)

6/23/77 32. SECOND SUPPLEMENT: To petition and complaint in item #'s 9 and 13 above.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (8 pp.)

6/23/77 33. STATEMENT
[By] ALASKA PIPELINE SYSTEM
(by B. E. Benjamin) (13 pp.)

6/23/77 36. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] ARCO PIPELINE COMPANY
(by R. E. Jordan, III) (198 pp.)

Date

6/27/77 37. LETTER: Addressed to Douglas Baldwin, requesting the Commission to reconsider its decision to close the special meeting scheduled for 6/28/77.
[By] UNITED PRESS INTERNATIONAL
(by G. Dillman) (2 pp.)

6/27/77 38. LETTER: Addressed to H. Gordon Homme, requesting. . . .
[By] DIANE B. COHN (on behalf of Edward K. DeLong, U.P.I.) (2 pp.)

6/27/77 39. LETTER: Addressed to A. Daniel O'Neal, requesting. . . .
[By] COMMON CAUSE
(by D. Cohen) (1 p.)

6/27/77 40. ORAL ARGUMENT: For testimony adduced at the oral argument held 6/27/77, see Volume 2 on page 9 herein.
[By] THE COMMISSION (208 pp.)

6/27/77 41. MOTION: For leave to file memorandum in reply to the responses of the carriers.
[By] THE DEPARTMENT OF JUSTICE
(by D. A. Kaplan) (9 pp.)

6/27/77 43. ORAL ARGUMENT EXHIBITS
[By] STATE OF ALASKA
(by J. M. Cleary) (10 pp.)

6/27/77 44. ORAL ARGUMENT EXHIBITS
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT
(by E. D. Greenberg) (14 pp.)

6/27/77 TRANSCRIPT OF ORAL ARGUMENT: NO EXHIBITS IN EVIDENCE
(BY THE COMMISSION) (206 pp.)

7/1/77 45. THIRD SUPPLEMENTAL PETITION: And COMPLAINT.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by J. T. French) (4 pp.)

7/5/77 46. CONFERENCE: For testimony adduced at the conference held 7/5/77, see Volume 2 on page 9 herein.
(BY THE COMMISSION) (19 pp.)

Date

7/12/77 47. PROTEST/COMPLAINT: Seeking suspension and investigation.
[By] STATE OF ALASKA
(by J. M. Cleary) (10 pp.)

[End of Docket Entries in No. 36611 certified by the Secretary]

INTERSTATE COMMERCE COMMISSION

Docket I & S 9164

6/28/77 1. ORDER: That the operation of specified schedules is suspended, that the use thereof in interstate or foreign commerce be deferred from 6/30/77, and to and including 1/29/78, except as to I.C.C. 2, published by Amerada Hess, which bears a July 1 effective date and the operation of which is suspended to 1/31/78, unless ordered by this Commission; that an investigation is instituted into and concerning the lawfulness of the rates contained in the suspended schedules, as well as the interim schedules authorized to be filed, pursuant to section 15(1) and section 15(7), with a view to making such findings and orders in the premises as the facts and circumstances shall warrant; that the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said rates under the IC Act; that the named carriers are authorized to file, upon not less than one day's notice, interim rates not exceeding specified amounts subject, however, to specified conditions; and that the said carriers are made respondents to this proceeding. (This order also embraces No. 36611).
BY THE COMMISSION (Commissioner Brown approves the order except insofar as it denied the motion of the Department of Justice for leave to file a response to the carrier's responses) (21 pp.)

7/8/77 3. PETITION: For Reconsideration.
[By] EXXON PIPELINE COMPANY
(by R. J. Flynn) (20 pp.)

Date		
7/15/77	8.	NOTICE: A court action was instituted on or about 7/6/77, involving these proceedings before the U.S. Court of Appeals for the Fifth Circuit. [By] H. G. HOMME, JR., Acting Secretary (1 p.)
7/15/77	9.	NOTICE: A court action . . . on or about 7/8/77. . . .
7/19/77	10.	NOTICE: A court action . . . on or about 7/11/77. . . .
7/26/77	11.	NOTICE: A court action . . . on or about 7/13/77. . . .
		[End of Docket Entries in No. I & S 9164 certified by Secretary]

VOLUME II

Verified Petition To Annul, Set Aside And Enjoin Enforcement Of An Order Of The Interstate Commerce Commission, July 6, 1977.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Case No. 77-2392

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA;
THE INTERSTATE COMMERCE COMMISSION; and
A. DANIEL O'NEAL, Chairman
CHARLES L. CLAPP, Vice Chairman
RUPERT L. MURPHY, Commissioner
VIRGINIA MAE BROWN, Commissioner
GEORGE M. STAFFORD, Commissioner
DALE W. HARDIN, Commissioner
ROBERT C. GRESHAM, Commissioner
ALFRED T. MACFARLAND, Commissioner
BETTY JO CHRISTIAN, Commissioner

Respondents.

Mobil Alaska Pipeline Company ("Mobil Alaska") hereby petitions this Court to annul, set aside and enjoin enforcement of an order of the Interstate Commerce Commission ("Commission") which (1) suspends for seven months the effective date of the tariff rates filed by the owners of the Trans Alaska Pipeline System ("TAPS") including the rate filed by Mobil Alaska pending investigation and hearing by the Commission, and (2) which prescribes substantially lower rates to be applied by the TAPS

owners during the seven-month suspension period, on the grounds that the said order of the Commission (1) unlawfully exceeds its authority under the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.;* (2) violates petitioner's constitutional right to due process of law; and (3) constitutes gross abuse of discretion. TAPS is a newly-constructed petroleum pipeline presently scheduled to commence common carrier operations on or about July 18, 1977, and the relief sought by petitioner would permit it to conduct operations at the originally-filed and presumptively lawful rates during the period of Commission investigation, rather than at the reduced rate prescribed by the Commission. Petitioner alleges as follows:

Parties

1. Petitioner Mobil Alaska Pipeline Company is a corporation organized and existing under the laws of the State of Delaware with its principal office at 1201 Elm Street, Dallas, Texas. Mobil Alaska's sole business activity consists of its ownership of a five (5) percent undivided interest in the Trans Alaska Pipeline System. It has no present or planned common carrier operations other than those described in this petition.

2. Respondent, the United States of America is a proper respondent in this action pursuant to 28 U.S.C. §§ 2322, 2344.

3. Respondent Interstate Commerce Commission is an agency of the United States organized and existing under the provisions of the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.*, as amended ("Act").

4. Respondents David O'Neal, Chairman, Charles L. Clapp, Vice Chairman, Rupert L. Murphy, Virginia Mae

Brown, George M. Stafford, Dale W. Hardin, Robert C. Gresham, Alfred T. MacFarland and Betty Jo Christian are Commissioners of the Interstate Commerce Commission and in that capacity have been delegated certain powers and duties pursuant to the Act. These respondents are named herein in their official capacities and subsequent references to "Commission" are intended, unless the context otherwise indicates, to include both the Commission and its Commissioners.

Jurisdiction and Venue

5. This action arises under the Interstate Commerce Act, 49 U.S.C. § § 1 *et seq.* and the Fifth Amendment to the Constitution of the United States.

6. The jurisdiction of this Court is invoked pursuant to 5 U.S.C. § § 702, 705 and 28 U.S.C. § § 2321(a), 2342(5) and 2349. Under 28 U.S.C. § § 2321(a) and 2342(5) the courts of appeals of the United States are vested with exclusive jurisdiction of proceedings to enjoin, set aside, suspend or determine the validity of orders of the Interstate Commerce Commission. Relief is requested pursuant to 28 U.S.C. § 2349, as well as 28 U.S.C. § 1651(a) which authorize all courts established by Act of Congress to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

7. Venue in this action is properly laid in the Fifth Circuit Court of Appeals. Pursuant to 28 U.S.C. § 2343, petitions to enjoin or set aside orders of the Commission may be brought in the judicial circuit in which the petitioner maintains its principal office.

8. Petitioner has exhausted all administrative remedies available for the protection of its rights and has no prompt, adequate or effective remedy of law.

BACKGROUND

9. In 1968 the discovery of a very large deposit of oil in the Prudhoe Bay area on the North Slope of the State of Alaska generated immediate and substantial exploration interest in that area on the part of the major oil companies of the world. Bids were submitted to the State of Alaska at its invitation for exploration and development rights on the North Slope and the successful bidders were announced on September 10, 1969, this sale contributing more than $900 million to the State's treasury.

10. Shortly after the Prudhoe Bay discovery, plans were announced to construct a pipeline to transport the crude oil approximately 800 miles south to the Port of Valdez where it would be transshipped by tankers to domestic markets. In 1970, seven oil companies (another company joined the group later) agreed to jointly construct the pipeline through an agent corporation to be known as Alyeska Pipeline Service Company. Alyeska means "the great land" in the Aleut Language.

11. Research and planning for this complex project were underway by 1971 and application to the Department of Interior for right of way permits through federal lands was made. However, the commencement of actual construction was delayed from 1971 to 1974 by litigation over the environmental consequences of the project.

12. The delay caused by the judicial and administrative disputes over whether and how the pipeline should be constructed was ended by enactment on November 16, 1973, of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § § 1651 *et seq.*, which declared that "[t]he earliest possible construction of a trans-Alaska oil pipeline . . . will best

serve the national interest." That Act further declared, "The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources." 43 U.S.C. § 1651 (Supp. 1977).

13. Construction of the pipeline system began officially in April, 1974 with work on the 360 mile-long haul road north of the Yukon River. The haul road, completed in only five months, made possible the first overland, all-weather route from the Yukon to Prudhoe.

14. In addition to the haul road, fifteen permanent access roads were built to link the main road with pump station sites and with the three permanent airfields and eight temporary airfields also built as part of the project. A two lane bridge over the Yukon River at a point where it is one-half mile wide was built as part of the pipeline route.

15. The project encountered numerous challenges. TAPS crosses some of the most rugged terrain in North America, varying from flood plains and river crossings to high mountain passes with hostile climactic conditions. Unusual design problems were caused by the permafrost, a permanently frozen marsh, through which the line was to be constructed. The heat caused by construction and actual transportation of crude oil risked permanent damage to this ecologically fragile environment without innovative design techniques. The possibility of earthquakes further complicated design and construction.

16. Response to these problems resulted in building 423 miles of pipeline above ground on cross beams supported by vertical support members ("VSM"). A VSM is an 18-inch pipe, specially designed and made for TAPS. The

mounted pipe is fully insulated with four inches of resin-impregnated fiberglass covered with a galvanized steel jacket while the assemblies are covered with molded fiberglass and polyurethane foam. This insulation is to keep the oil from chilling to below the pour point. To keep the permafrost from warming, seventy percent of the 80,000 VSM's have selfsupporting heat pipes enclosing systems which take heat from the ground and transfer it to the air. Some underground pipe is surrounded by insulation and cooling units to protect the permafrost.

17. Thirty-one construction camps along the pipeline route, each typically costing approximately 7-10 million dollars, were built.

18. The Valdez marine terminal, built at a cost in excess of $1 billion, is one of the most technologically advanced marine facilities in the world; it includes ballast treatment facilities, oil storage tanks and berths capable of handling supertankers of 195 thousand deadweight tons. The TAPS project as a whole is reputed to be the largest private construction project in recent history.

19. On June 20, 1977 the construction of the 800-mile TAPS pipeline was completed at a cost exceeding $9 billion dollars, including over $1.2 billion dollars in interest costs to date. A map illustrating TAPS' route from the Arctic Ocean to the Gulf of Alaska is attached as Exhibit A. At the same time, the pipeline owners began to fill the line with North Slope oil in preparation for the commencement of common carrier transportation operations when the oil arrives in the Port of Valdez. It is estimated that the line-fill will not be completed until on or about July 18, 1977, since meticulous monitoring of the entire pipeline is being employed to assure satisfactory performance.

NATURE OF THE CONTROVERSY

20. Mobil Alaska and seven other companies own undivided interests in TAPS. Under the undivided interest form of ownership, each owner holds its percentage share of the system as its exclusive separate property, is required to contribute its corresponding share of the total costs of the system, and has the right and obligation to utilize its percentage share of the capacity of the system as a common carrier to transport oil for any shipper without discrimination. Each owner must separately publish tariffs and receive tenders for shipments through its portion of the capacity of TAPS. TAPS owners and their percentage ownership interests are:

Sohio Pipe Line Co.	33.34%
Arco Pipe Line Co.	21%
Exxon Pipeline Co.	20%
BP Pipelines Inc.	15.84%
Mobil Alaska Pipeline Co.	5%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

21. Upon filling of the pipeline in mid July, 1977, crude oil will be available for delivery at the TAPS Marine Terminal at Valdez. At that time Mobil Alaska would be able to operate as a common carrier subject to the provisions of the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.*, if it has on file at the Commission a tariff which has not been cancelled or suspended.

22. Pursuant to 49 U.S.C. § 6(1) every common carrier subject to the Act must file with the Commission and publish a tariff "showing all the rates, fares, and charges for transportation between different points on its own route.

. . ." Deviation from tariffs so filed is prohibited by 49 U.S.C. § 6(7); transportation operations without a lawfully filed tariff are prohibited by the same paragraph of § 6. The Commission is without authority under § 6 to reject a tariff filed under § 6 unless its form is not in compliance with Commission regulations, 49 U.S.C. § 6(6), or it fails to state its effective date, 49 U.S.C. § 6(9).

23. The regulations of the Commission, Tariff Circular 20, Rule 57, 49 C.F.R. § 1300.57, require that tariffs applicable to newly constructed pipelines be filed with the Commission not less than ten days before the effective date of said tariffs. Tariff changes are required by 49 U.S.C. § 6(3) to be filed on thirty-days' notice unless special permission to file on less notice is obtained.

24. Pursuant to the requirements of Tariff Circular 20, Mobil Alaska filed its first and only tariff over the Trans Alaska Pipeline System on June 10, 1977 effective June 20, 1977. Mobil Alaska's Tariff I.C.C. No. 1 included the rules which would govern its acceptance and shipment of crude oil. This tariff covering the rules is not in controversy. Mobil Alaska's Tariff I.C.C. No. 2 included only its rate, the amount in cents per barrel of crude oil which it will charge for transportation from Prudhoe Bay to Valdez. In order to accommodate a Commission request, Mobil Alaska filed a supplement extending the effective date of its rate tariff to June 30, 1977, and it is this rate tariff which is the subject of this controversy.

25. Mobil Alaska's rate tariff was lawfully filed in accordance with the requirements of 49 U.S.C. § 6 and it is presumptively lawful and reasonable under the Act unless and until adjudicated unlawful on the basis of record evidence developed at a "full hearing" pursuant to 49 U.S.C. § 15(1).

26. On June 13, 1977, the Commission issued a Notice announcing that it would conduct a summary suspension proceeding to consider TAPS rate tariffs. The Notice contained a schedule which provided for submission of protests to the six TAPS rate tariffs then on file at the Commission, and also provided for the submission of replies to any protests by the TAPS owners. The Notice further announced that oral argument would be held on June 27, 1977 and stated that the deadline for a Commission decision on any relief requested by protestants would be June 29, 1977.

27. On June 15, 1977, the United States Department of Justice, Antitrust Division, the Bureau of Investigations and Enforcement of the Interstate Commerce Commission, the State of Alaska and the Arctic Slope Regional Corporation ("Protestants") filed protests to the TAPS tariffs then on file at the Commission. Alleging all the TAPS rates to be unlawful, each of the four Protestants requested that the Commission suspend the TAPS owners' tariffs, including that of Mobil Alaska, and that it institute a formal investigation of all the TAPS rates. In addition, each of the Protestants urged the Commission to establish interim rates, substantially lower than the carrier-filed rates, which the TAPS owners would be allowed to refile on one day's notice. Such interim rates were requested to supplant the carrier-initiated rates and to remain in effect pending the expected formal hearing adjudicating the lawfulness of the TAPS rates. Protestants stated that they urged the prescription of interim rates in order to avoid the effect of a suspension decision—preclusion of lawful transportation operations—during the pendency of the suspension period.

28. On June 22, 1977, Mobil Alaska submitted its reply to the protests in which it argued that its challenged rate was both reasonable as well as lawful; that the Commission lacked authority to suspend a first rate filed for a newly-constructed pipeline which was planned and constructed to offer transportation services not previously available at that location; and that a suspension order entered without prejudice to refiling at a lower rate suggested or prescribed by the Commission would be unlawful.

29. On June 27, 1977, the full Commission heard oral argument on the protests, including Mobil Alaska's contentions that the Commission lacked the power to suspend the TAPS rate tariffs and that any Commission order designed to result in refiling of TAPS rates at lower levels would constitute unlawful prescription of rates.

The Commission's Order

30. The full Commission, on June 28, 1977, entered an order suspending the rate tariffs as filed by Mobil Alaska and six other TAPS owners; the eighth owner's tariff having been filed later than the rest, it was found by the Commission as not ripe for disposition. The order suspended the rates for the maximum period of seven months as specified in 49 U.S.C. § 15(7); instituted an investigation into and concerning the lawfulness of the rates in the suspended schedules; and authorized the TAPS owners to refile, on not less than one-day's notice, "interim rates" not exceeding rates specified in the order. A copy of this order is attached as Exhibit B.

31. The interim rates set by the Commission are substantially lower than those filed by the TAPS owners:

	As Filed By TAPS Owners	Authorized By Order	Reduction
Amerada Hess Pipeline Corporation	$6.44	$4.85	$1.59
Arco Pipe Line Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corporation	6.22	Not Acted Upon Yet	
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

32. The TAPS owners argued that the Commission was not empowered to suspend originally filed rates, and even if so authorized, no basis existed for suspension of the TAPS rates:

> [TAPS owners] argue that protestants would not be harmed by allowing the proposed rates to go into effect, inasmuch as refunds or reparations would be available if the investigation should show that the filed rates are too high. Order at 3.

33. The Protestants argued that the possibility of refunds did not constitute adequate protection:

> The Arctic Slope Regional Corporation, which represents Alaskan Natives, notes that the longer it must wait for its share of royalty revenues (which

> are adversely affected by high transportation rates), the less value such revenues will have. Protestants also argue that the maintenance of pipeline rates at too high a level would act as a deterrent to the use of the pipeline by independent oil producers. Order at 3.

34. The Commission held:

> Although we recognize that the refund remedy is available, we do not believe that the rates can be allowed to go into effect, without suspension, when, as here, the protestants have made a showing or probable unlawfulness. Moreover, as noted by protestants, the maintenance of excessively high rates could act as an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil. Under the circumstances, we have concluded that the proposed rates, as filed, should be suspended, pending our investigation, for the statutory period of 7 months. Order at 3.

35. The Commission further concluded that the power to allow interim rates is inherent in the suspension power and that to suspend without "allowing" interim rates "would be to preclude the carriers from commencing their operations during the suspension period." Order at 4. The Commission also recognized that the TAPS owners "may" have no means of obtaining restitution in the event that they acceded to the Commission's order and the investigation proved the interim rates imposed during the suspension period to be too low. Order at 4.

36. The interim rate set for the Mobil Alaska portion of TAPS was alleged to have been computed by the Commission using "basic data supplied" by petitioner and other TAPS owners. Mobil Alaska has not, however, supplied to the Commission the data upon which it computed its originally filed rate. Therefore the Commission's calculations necessarily were based in part upon assumptions concerning both the data applicable to Mobil Alaska's rate, as well as assumptions by the Commission concerning the procedures followed by petitioner when it computed its rate as originally filed.

Relevant Statutory Provisions and Regulations

37. Those to be regulated by the Commission are covered in Section 1 of the Act which states in relevant part

> (1) That the provisions of this part shall apply to *common carriers engaged in* . . .
>
> (b) The *transportation* of oil . . . by pipe line, or partly by pipeline and partly by railroad or by water. 49 U.S.C. § 1 (emphasis added)

38. The Commission's power to suspend tariffs is governed by § 15(7), incorporated into the Act with the passage of the Mann-Elkins Act in 1910, Pub. L. No. 61-218, ch. 309, 36 Stat. 539, June 18, 1910, which states in relevant part:

> Whenever there shall be filed with the Commission *any schedule stating a new individual or joint rate,* fare, or charge, or any *new* individual or joint classification, or any *new* individual or joint regulation or practice *affecting any rate, fare, or charge,* the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without

> complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. . . . 49 U.S.C. § 15(7) (emphasis added).

39. A proceeding pursuant to § 15(7) to determine whether to suspend a proposed "new" tariff rate is a summary, informal proceeding designed to permit a discretionary decision not ordinarily subject to judicial review. It is made within the short period of time after a rate is filed but before its effective date. No evidentiary rights exist in a suspension proceeding nor is any record developed as a basis for judicial review, Commission Rules of Practice ("Commission Rules"), Rule 200, 49 C.F.R. § 1100.200. Commission Rule 57, 49 C.F.R. § 1100.57, specifically precludes use of normal discovery devices in hearings governed by Rule 200.

40. To ensure the complete separation of the summary suspension proceeding from a due process hearing pursuant

to § 15(1), Commission Rule 19, 49 C.F.R. § 1100.19 declares that documents filed in a suspension proceeding shall not constitute evidence

> Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations or practices alleged to be material. A filing under Rule 42 *Petitions for suspension of tariffs or schedules,* shall not be considered a pleading for purposes of this rule. 49 C.F.R. § 1100.19.

41. The Commission's power to determine and prescribe rates is governed by Section 15(1) of the Act which states in relevant part:

> That whenever, *after full hearing,* upon a complaint made as provided in Section 13 of this title, or *after full hearing* under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property . . . is or will be unjust or unreasonable . . . or otherwise in violation of any of the provisions of this chapter, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate . . . 49 U.S.C. § 15(1). (emphasis added)

FIRST CAUSE OF ACTION

42. Mobil Alaska repeats and realleges paragraphs 1 through 41 above with full force and effect as if fully set forth herein.

43. The Commission's actions and order suspending petitioner's TAPS tariff rate were in excess of its lawful authority and without observance of the procedures required by law. Petitioner will suffer irreparable harm by reason of its tariff rate not being in effect when the TAPS pipeline is ready to commence common carrier operations on or about July 18, 1977.

44. Petitioner's originally-filed tariff rate for the TAPS pipeline is not a "new" rate within the meaning of Section 15(7) of the Act and thus cannot be suspended by the Commission.

> a. The Trans Alaska Pipeline System is newly-constructed to afford crude oil transportation in a geographic location previously devoid of any regulated common carrier operations performing the same or similar services.
>
> b. The Trans Alaska Pipeline System is clearly *sui generis* in the history of pipeline construction projects attempted in the United States due to the unique climatic conditions, terrain circumstances

and environmental concerns which the builders were required to overcome.

c. The Trans Alaska Pipeline System was built in three years with minimum effect on the surrounding environment, a remarkable construction and engineering feat considering the uniquely adverse conditions which had to be surmounted.

d. The Congress of the United States declared that the *"earliest possible construction* of a trans-Alaska pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and *will best serve the national interest,"* 43 U.S.C. § 1651(c) (emphasis added), thus further distinguishing the construction of TAPS from any other pipeline construction project.

e. The operation of the Trans Alaska Pipeline System will present continuing financial risks to its owners quite unlike any associated with other petroleum pipeline operations in the United States since environmental concerns required that 423 miles of TAPS be constructed above ground making it vulnerable to sabotage, earthquake, and climatic damage which could result in damage to the surrounding environment in the event of a break in the line.

f. The tariff rates originally filed by the TAPS owners, while computed in accordance with standard rate-determination procedures as established and endorsed by past Commission practice, nevertheless present unprecedented rate-determination questions for eventual disposition by the Commission.

g. The originally-filed TAPS tariff rates are not "new" rates within the meaning of Section 15(7), and thus not subject to the Commission's summary suspension power for the further reason that they do not

i. change, replace or otherwise affect an existing rate;

ii. pertain to a pipeline or other transportation facility presently engaged in transportation within the meaning of the Act; and

iii. pertain to a transportation service which, upon summary suspension of the "new" rate, would continue to be available to the public.

h. Mobil Alaska's originally-filed TAPS tariff rate, not constituting a "new" rate within the meaning of the Act, the Commission is prevented by the Act from making any determination concerning the reasonableness, justification, and lawfulness of said tariff unless and until a full evidentiary hearing is held, and petitioner afforded meaningful opportunity to discover and test the evidence, if any, upon which the reasonableness of its rate is challenged, so that the Commission's determination would be susceptible to judicial review.

i. Mobil Alaska is not a common carrier subject to regulation by the Commission since it is not "engaged" in transportation within the meaning of the Act, 49 U.S.C. § 1, and will not be in a position to engage in transportation until such time as TAPS is filled and ready to deliver crude oil at the Port Valdez in Alaska. Suspension of petitioner's tariff presents petitioner with two choices, either (1) delay

commencement of common carrier operations pending investigation, full hearing and ultimate determination of the TAPS rate questions by the Commission, or upon expiration of seven months, whichever should occur first; or (2) accept the Commission's interim rate pending final rate determination or the expiration of the seven-month period. The Commission's power to suspend "new" rates does not include the power to impose further sanctions of this nature upon pipeline owners and further evidences that petitioner's originally-filed TAPS tariff is not a "new" tariff within the meaning of the Act.

SECOND CAUSE OF ACTION

45. Mobil Alaska repeats and realleges paragraphs 1 through 41 above with full force and effect as if fully set forth herein.

46. Even if Mobil Alaska's originally-filed TAPS tariff is a "new" tariff within the meaning of Section 15(7) of the Act, in summarily determining "that there has been a sufficient showing of probable unlawfulness," and in ordering the suspension of petitioner's tariff rate, the Commission acted arbitrarily and capriciously and grossly abused its discretion.

a. Mobil Alaska has not been permitted appropriate opportunity to present any evidence concerning the procedures followed and the standards complied with in the formulation of its originally-filed rate. The Commission's rules do not require submission of such evidence when a rate is filed, 49 U.S.C. § 6, the requirement arising only upon insti-

tution of an investigation by the Commission in accordance with Section 15(1) of the Act. The investigation of petitioner's tariff commenced with the Commission's order which was issued on June 28, 1977 and which also ordered the suspension of said tariff rate.

b. The Commission's Rules do not permit filings made seeking suspension of rates to be considered as evidence. Rule 19.

c. Since the Trans Alaska Pipeline System is a newly-constructed property located in a part of the United States where oil has only recently been discovered, and since the magnitude and complexity of the TAPS construction project is unrivaled in the history of the petroleum pipeline industry, the Commission lacked the experience as well as the expertise upon which it might call for purposes of preliminarily assessing the "probable unlawfulness" of petitioner's originally-filed rate.

d. The Commission's actions and order suspending petitioner's TAPS rate were in fact based upon the opinions of representatives of the protestants, State of Alaska and Arctic Slope Regional Corporation. Petitioner was deprived of any reasonable opportunity to test the validity of those opinions, in particular, their claims that maintenance of the rates as originally filed by the TAPS owners pending final determination as to reasonableness by the Commission following investigation and hearing (1) "could act as an obstacle to the use of the pipeline by non-affiliated oil producers"; (2) that the longer the Arctic Slope Regional Corporation, which represents the

Alaskan Natives, "must wait for its share of royalty revenues (which are adversely affected by high transportation rates), the less value such revenues will have"; and (3) that the possibility of refunds does not constitute "adequate protection" for the protestants. Order at 3.

e. Sub-paragraphs a. through i. of paragraph 44 above are repeated and realleged with full force and effect as if fully set forth herein.

THIRD CAUSE OF ACTION

47. Mobil Alaska repeats and realleges paragraphs 1 through 43 above with full force and effect as if fully set forth herein.

48. The Commission's actions and order prescribing the rate at which petitioner would be permitted to operate its portion of TAPS as a common carrier until January 29, 1978 were in excess of its lawful authority and without observance of the procedures required by law. Petitioner will suffer irreparable harm by reason of its originally-filed tariff rate not being in effect for the specified seven-month period.

49. Section 15(1) of the Act provides the procedures to be followed before the Commission is empowered to determine and prescribe a rate and to issue an order prohibiting a carrier from publishing, demanding or collecting any rate other than the rate prescribed, 49 U.S.C. § 15(1). Section 15(1) provides that the Commission may only prescribe a rate "after full hearing."

50. Neither Section 15(1) nor Section 15(7) of the Act grants to the Commission any authority to prescribe a rate

on the basis of summary proceedings that deprive the carrier of the right to discovery, as provided in the Rules, as well as the right to a full hearing on the record with the opportunity to present evidence to support the reasonableness of its rate and to test by cross-examination and otherwise, allegations that its rate is unreasonable.

FOURTH CAUSE OF ACTION

51. Mobil Alaska repeats and realleges paragraphs 1 through 41 above with full force and effect as if fully set forth herein.

52. Even if the Commission is empowered to prescribe interim rates on the basis of summary proceedings and is not required to take such action after full hearing, the exercise of such power on June 28, 1977 as to Mobil Alaska was arbitrary and capricious and constituted gross abuse of Commission discretion for the reasons set forth in subparagraphs (a) through (i) of paragraph 44 above and subparagraphs (a) through (d) of paragraph 46 above.

FIFTH CAUSE OF ACTION

53. Mobil Alaska repeats and realleges paragraphs 1 through 41 above with full force and effect as if fully set forth herein.

54. The Commission's actions and order suspending petitioner's originally-filed TAPS tariff rate and the setting of an interim rate as a condition precedent for the commencement of common carrier operations by petitioner as an owner of the Trans Alaska Pipeline System, are prohibited by the Fifth Amendment to the Constitution of the United States and violate elementary and controlling principles of fairness and administrative due process for the

reasons set forth in subparagraphs (a) through (i) of paragraph 44 above and subparagraphs (a) through (d) of paragraph 46 above.

SIXTH CAUSE OF ACTION

55. Mobil Alaska repeats and realleges paragraphs 1 through 41 above with full force and effect as if fully set forth herein.

56. The interim rate of $4.84 per barrel which the Commission seeks to impose upon petitioner's operation of its portion of the Trans Alaska Pipeline System for the period on or about July 18, 1977 through January 29, 1978 would not permit Mobil Alaska to cover its share of operating expenses for TAPS during that period, nor its capital costs of doing business. The interim rate of $4.84 per barrel would not produce enough revenue during the period to allow Mobil Alaska to service its debt and allow a return on equity sufficient to attract capital (Order at 7).

57. Mobil Alaska will have no opportunity to recoup the losses in revenue and other losses which it will incur if the interim rate becomes effective during the suspension period. Thus, the Commission's actions and order suspending petitioner's originally-filed tariff rate, and the setting of an interim lower rate as a condition precedent to petitioner's operation of its portion of TAPS for the period July 18, 1977, or thereabouts, through January 29, 1978 constitutes confiscation of Mobil Alaska's property without just compensation in violation of rights guaranteed by the Fifth Amendment to the Constitution of the United States.

IRREPARABLE INJURY

58. Unless enjoined and restrained by this Court, respondents' actions and orders as herein before alleged will cause immediate, substantial and irreparable injury to petitioner and others, including the following:

a. The Commission's actions and order of June 28, 1977 will require Mobil Alaska to choose between the following alternatives on or before July 17, 1977, each of which will cause irreparable injury to petitioner:

(i) Petitioner can elect not to refile its TAPS tariff at the $4.84 rate prescribed by the Commission, which would deprive it of common carrier status under the Act and thus effectively prevent operation of its portion of TAPS until such time as the Commission completes its determination as to the lawfulness of petitioner's originally-filed rate or until January 29, 1978, whichever should occur first. This course of action would postpone for at least some months the time when Mobil Alaska could expect its investment in TAPS to commence producing revenue, and would thus constitute a revenue loss of up to $88,000 per day to Mobil Alaska for each day after July 18, 1977, which is the date presently scheduled for the commencement of TAPS common carrier operations.

(ii) Petitioner can otherwise elect to commence common carrier operations on or about July 18, 1977 by refiling its tariff at $4.84 in accordance with the Commission's order, which would result in a daily loss of revenue to Mobil Alaska, due to the $1.47 reduction in its original rate, of between

$44,100 to $88,200 per day until January 30, 1978 or ultimate Commission determination of the TAPS rates, whichever should occur first.

b. If petitioner is forced to accede to the Commission's actions and order, and operates its portion of TAPS at the reduced interim rate set by the Commission for the suspension period, it will suffer a loss amounting to approximately $18,522,000. The estimated loss which would be suffered by all TAPS owners resulting from the pipeline operation for the suspension period at the reduced rates would be approximately $343,335,000. These losses in revenue could not be recovered by the TAPS owners in the event that the Commission ultimately determines that their originally filed rates for TAPS are just, reasonable and lawful.

In contrast, royalty-owner protestants, as recognized by the Commission, Order at 3, stand to suffer delay in receipt of, but not loss of, royalty revenue should the originally filed rates remain in effect and the Commission ultimately determine a lower rate to be reasonable. Thus, if the interim rates were found to be the lawful rate, and the originally filed rates were effective during the suspension period, Alaska's royalty interest in Mobil Alaska's overcollection would be approximately $2,315,000, and $46,000 of that amount would represent the interest of Arctic Slope Regional Corporation. Thus, the Commission's actions and order, if implemented, will require Mobil Alaska permanently to forego $18.5 million in revenues for the principal purpose, according to the order, of merely assuring against any possibility of delay in royalty payments amounting to $2.3 million

for the State of Alaska and $46,000 for the Arctic Slope Regional Corporation.

c. If Mobil Alaska and/or other TAPS owners decide that it is in their best individual interest not to refile tariff rates at the interim levels set by the Commission, an alternative which is probably not economically viable given the magnitude of the investment made in TAPS and the owners' need to have that property start producing revenue, the resulting shut-in of all or part of the TAPS crude oil transportation capacity would cause irreparable injury to the national energy policy and the overall economy of the United States.

d. The respondents' actions will have a chilling effect upon future decisions to invest in petroleum pipeline property subject to Commission regulation due to the *ad hoc* and summary approach taken by the Commission in responding to the unsupported claims made against the TAPS rates by protestants.

59. The price to be paid by refiners on the West Coast of the United States for the North Slope crude oil to be transported by TAPS, and thus the price to be paid by consumers for the petroleum products to be manufactured from said crude, will not be affected by the subject controversy concerning the TAPS rates since the Federal Energy Administration (FEA) established the prices refiners will pay for North Slope crude and the TAPS transportation cost will be included within, and not in addition to, the FEA determined prices.

PRAYER

WHEREFORE, petitioner prays that this Court:

A. Enter judgment annulling and setting aside the Commission's order of June 28, 1977 in Investigation and

Verified Petition of Mobil Alaska To Annual ICC Order.

Suspension Docket No. 9164, "Trans Alaska Pipeline System (Rate Filings)";

B. Enter judgment enjoining and restraining the respondents and all persons acting under their direction and authority, or in active concert or participation with them from taking or attempting to take any action to prevent the tariff rates as originally filed by the TAPS owners, including the $6.31 rate as filed by petitioner, from becoming immediately effective and from remaining effective as the lawful rates applicable to the common carrier operation of that petroluem pipeline unless and until the Commission should determine and prescribe, following investigation and after full hearing, that rates other than those as originally filed are reasonable, just and lawful.

C. Enter judgment as prayed for in paragraph B above, preliminarily until ten (10) days after final determination of this action on the merits by this Court.

D. Grant petitioner such other, further or different relief as to the Court may seem just and proper.

Dated: July 5, 1977

Respectfully submitted,

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Mobil Alaska Pipeline Company

[Verification of James R. Kinzer, Certificate of Service and Map of Trans Alaska Pipeline Route (Exhibit A) omitted in printing.]

Order of Interstate Commerce Commission Suspending Tariffs and Authorizing Interim Rates, Attached As "Exhibit B" to Verified Petition of Mobil Alaska Pipeline Co., Filed July 6, 1977.

ORDER *

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 28th day of June, 1977.

INVESTIGATION AND SUSPENSION
DOCKET NO. 9164

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

No. 36611

TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

Initial rate tariffs have been filed by eight pipeline companies, proposing to operate as common carriers of crude petroleum over the Trans Alaska Pipeline System.

Protests and petitions for suspension of the tariffs have been filed by the United States Department of Justice, the State of Alaska, the Arctic Slope Regional Corporation and our Bureau of Investigations and Enforcement. These pleadings seek to invoke our power under section 15(7) of the Interstate Commerce Act (1) to enter upon a hearing concerning the lawfulness of the tariffs and (2) pending the hearing and decision, to suspend the operation of the tariffs for a period no longer than seven months. Replies to the protests have been filed by each of the eight carriers.

The tariffs are identified in Appendix 1 to this order. As noted therein, the various rules contained in the tariffs have already been placed under investigation by Commission order dated June 17, 1977, No. 36611. Consideration of the tariff rates, however, was deferred

* Corrected to include changes set forth in Correction Notice dated June 29, 1977.

to the present order. The rates per barrel proposed by the respective companies are as follows:

Amerada Hess Pipeline Corporation	$6.44
Arco Pipe Line Company	6.04
BP Pipelines Inc.	6.35
Exxon Pipeline Company	6.27
Mobil Alaska Pipeline Company	6.31
Phillips Alaska Pipeline Corporation	6.22
Sohio Pipe Line Company	6.16
Union Alaska Pipeline Company	6.09

With respect to these rates, we have given careful consideration to the protests, and to the carriers' replies. In addition, we have heard oral argument by the parties. It is our conclusion that a formal investigation concerning the lawfulness of the proposed rates should be instituted pursuant to sections 15(1) and 15(7) and that because of the close interrelationship of the rate filings and the applicable rules and regulations, they should be considered in the same proceeding. We further conclude that such rates should be suspended, without prejudice to the filing of interim rates, during the suspension period.

In reaching these conclusions, we have considered the following issues: (1) whether an investigation should be instituted; (2) whether the proposed rates can and should be suspended; (3) whether interim rates can and should be authorized; (4) what level of interim rates should be authorized: and (5) what conditions should be attached to the acceptance of interim rate filings.

The institution of an investigation.

Section 15(7) of the act empowers the Commission to enter upon a hearing concerning the lawfulness of a filed tariff stating a new rate or charge. In order for a rate to be lawful, a primary requirement is that it be

just and reasonable (section 1(5)). The act sets forth other requirements as well, and if an investigation is instituted, any and all aspects of the lawfulness of the rate may be considered. However, the question raised by the protests is whether there is reason to believe the proposed rates are not just and reasonable.

Protestants contend that the filed rates would provide excessive profits, whether compared with a traditional rate of return on valuation or with the carriers' capital costs. They also contend that the cost data provided by the carriers is overstated.

The carriers reply that their rates were computed to allow a 7 percent return on valuation, as contemplated in a 1941 consent agreement between the Justice Department and a number of shipper-owned pipelines (*United States* v. *Atlantic Refining Co.*, C.A. No. 14060, D.D.C. decided December 23, 1941). They also assert that the standards used by protestants are unrealistic in that they do not recognize that the carriers are able to maintain high levels of debt financing only because such debt is guaranteed by the parent oil companies. The carriers argue that, without such guarantees, they would have to resort to a larger amount of equity financing, and their overall capital costs would be higher than the amounts recognized by protestants. The carriers also deny that their cost data is overstated. However, they do not object to a formal investigation of the filed rates.

For reasons set forth below, we do not accept the 1941 consent decree as a standard of reasonableness under the Interstate Commerce Act. Moreover, while there may be merit to the carriers' contentions that the standards used by protestants do not cover their true costs of capital, this is a matter that cannot be resolved until a more complete record is developed. Finally, evidentiary hearings will be necessary to develop acceptable cost

data for use in applying whatever measures of reasonableness are found to be appropriate. Therefore, we conclude that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates.

The suspension of the proposed rates. Some of the carriers argue that the Commission is without power to suspend initial rates. They rely on numerous references in legislative history and past cases to exercise of the suspension power in instances of "increased" rates. They rely on such references to conclude that the power of suspension does not apply to initial rates. However, the reason that the suspension powers are usually discussed in the context of increased rates is clear: the vast majority of rate proceedings involve situations where increases in existing rates are at issue.

We see no basis in the sources cited for concluding that we may not suspend initial rates. If this were the Congressional intention, we believe that it would have been explicitly stated. It was not so stated, and the carriers have been unable to cite any direct authority for their position.

It is stated in section 15(7) that the Commission is authorized to enter upon a hearing concerning "any schedule stating a new individual or joint rate, fare, or charge." Pending this hearing and decision, the Commission may suspend, for up to seven months, the schedule being investigated. In *Rail-Water, Grain in Bulk, Mo., Ill., and Ind., to Buffalo*, 321 I.C.C. 564, 566 (1963), it was said that the term "new rate" in section 15(7) encompasses "both changed and initial" rates.

Similar suspension powers pertaining to other modes of carriage are contained in sections 216(g), 218(c), 307(g), and 406(e) of the act. In each of these sections, there is "grandfather" language making the provisions

inapplicable to "initial" rates filed on or before a certain date. By implication, then, the investigation and suspension provisions *are* applicable to initial rates filed after such date.

As noted, if it were intended to exclude initial rates from the suspension power of section 15(7), one would expect specific language to this effect. No such language appears. Accordingly, we have no doubt that the suspension power is applicable to initial rates.

The carriers also question whether, even if the suspension power is applicable, we should exercise it here. They argue that protestants would not be harmed by allowing the proposed rates to go into effect, inasmuch as refunds or reparations would be available if the investigation should show that the filed rates are too high.

Protestants, however, do not consider the possibility of refunds to be adequate protection. The Arctic Slope Regional Corporation, which represents Alaskan Natives, notes that the longer it must wait for its share of royalty revenue (which are adversely affected by high transportation rates), the less value such revenue will have. Protestants also argue that the maintenance of pipeline rates at too high a level would act as a deterrent to the use of the pipeline by independent oil producers.

Although we recognize that the refund remedy is available, we do not believe that the rates can be allowed to go into effect without suspension, when, as here, the protestants have made a showing of probable unlawfulness. Moreover, as noted by protestants, the maintenance of excessively high rates could act as a deterrent or an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil. Under the circumstances, we have concluded that the proposed rates, as filed, should be suspended,

pending our investigation, for the statutory period of 7 months.

The specification of interim rates. Protestants seek to have the Commission name specific rates that may be charged by each carrier while the investigation is being conducted. The carriers, however, contend that the Commission has no power to do so. They argue that the specification of interim rates would be a rate prescription within the meaning of section 15(1) of the act, and that we are empowered to take such action only after a full hearing.

We see no basis for considering such action to be a prescription of rates.[1] We may authorize interim rates without requiring that the rates proposed in the tariffs be cancelled, and without precluding the proposed rates from taking effect at the end of the 7-month suspension period if our investigation is not then completed (subject, however to a refund provision as hereafter described). These interim rates would not be intended to have permanent effect, but would merely be interim rates that we would allow to be collected during the suspension period. Such rates, if filed, remain subject to Commission scrutiny and are not to be considered as prescribed

[1] *Moss* v. *C. A. B.*, 430 F.2d 891, is clearly distinguishable. That case involved ex parte meetings and the substitution by the Board of "a complete and innovative scheme for setting all passenger rates for the Continental United States," with an indication that such a filing would not be suspended. In *Moss*, the court noted that unlike the Interstate Commerce Act, the Federal Aviation Act has no provision for reparations, thus rendering the procedural safeguards of the Aviation Act the public's sole defense. The court also pointed out its view might have been different if interim action were involved. In the present TAPS proceeding, both the proposed rates and any interim rates which may be filed *will* remain subject to full investigation. See also *Consolidated Edison Co. of New York* v. *F. P. C.*, 168 U.S.App.D.C. 92, 512 F.2d 1332, 1340, distinguishing *Moss* v. *C. A. B.* and stressing the behind-the-scenes aspect of the *Moss* case.

within the meaning of the decision in *Arizona Grocery* v. *Atchison, T. & S. F. Ry., Co.*, 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348.

We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest.

Having concluded that we possess the power to authorize interim rates, we have no hesitation about taking such action in the present circumstances. If we were to suspend the proposed rates without allowing interim rates, the result would be to preclude the carriers from commencing their operations during the suspension period. Such a result would be contrary to the interests of all concerned.

The level of interim rates. We believe that the proper question to be asked concerning our action in these proceedings is not whether we have the discretion to authorize an interim rate. Rather, the question should be whether we have exercised such discretion in a reasonable manner.

The key to a proper exercise of our discretion in this situation lies in recognizing the possible consequences of our action. We must bear in mind that the carriers may have no means of obtaining restitution if initially required to maintain too low a rate. On the other hand, a remedy by way of refunds or reparations is available to persons injured by the charging of a rate that is ultimately found to be too high. In these circumstances,

the reasonable approach to determining an interim rate is (1) to accept the basic data supplied by the carriers and (2) at the same time to require the refund provision in the event that such amounts are ultimately determined to exceed a reasonable level. This, then, is the course that we shall follow.

The process of arriving at an acceptable interim rate requires two steps. The first is to define the basic carrier data that will be employed, and the second is to perform computations using such data.

The data that we will employ is set forth in Appendix 2. For the purposes of the present decision, we have, for the most part, employed the figures supplied by the carriers. Appendix 2 displays this data both in total dollars and in dollars per barrel. The conversion to per-barrel figures is based on the assumption that the normal traffic volume for the beginning years will be 438 million barrels a year (1.2 million barrels a day), and that this number of barrels will be apportioned among the carriers according to their respective ownership shares in the pipeline.

Of the items set forth in Appendix 2, substantial questions have been raised at this stage of the proceeding particularly with regard to removal and restoration costs and depreciation. Removal costs are the costs expected to be incurred at the end of the useful life of the pipeline in order to meet environmental requirements. According to the Alyeska Pipeline Service Company, these costs will amount to about $1.049 billion in 1977 dollars. Some of the carriers propose to simply set aside one twenty-fifth of their total share of this amount each year for 25 years. Others propose more detailed computations to inflate the removal costs to dollar costs for the year 2002, and to allow for compounded interest on the yearly accruals. The protestants, on the other

hand, seek to reduce the yearly removal charges by requiring that they be amortized over a period longer than 25 years.

With respect to depreciation charges, the carriers uniformly propose a 25-year service life, on the basis that known recoverable reserves on the North Slope are expected to be depleted in terms of economic recovery in 25 years. Protestants propose that service lives as long as 35 years be required, on the basis that additional oil fields exist on the North Slope that are likely to extend the pipeline's useful life and that even the present reserve may have a longer life than 25 years.[8]

Both of these issues will receive substantial attention during our formal investigation. However, at this stage of the proceedings, the data presented concerning additional reserves is of a somewhat uncertain nature. We do not deem this data sufficient to warrant a reduction in the amount allowed for depreciation for the purposes of determining the lawfulness of the proposed rates at the suspension level. By the same token, we will not, at this time, compute removal charges over an amortization period of more than 25 years.

For removal costs, we have used the same per-barrel allowance for each carrier, because we see no basis for cost differences among the carriers on this item. Our allowance is based on a simple amortization without inflation or discounting. While this approach may somewhat understate the amounts that need to be accrued, the magnitude of the discrepancy would not be great in terms of the overall tariff computation. It may well be outweighed by overstatement in the depreciation charges.

An additional issue is raised by protestants concerning the investment and valuation figures. It is their conten-

[8] It should be noted that at oral argument several protestants did not dispute the use of 25 years at the suspension level.

tion that these figures are affected by excessive construction costs. Needless to say, this issue will be a major focus of our formal investigation. However, as the protestants themselves concede, this is not a matter that can be properly dealt with at the present stage of the proceeding. Accordingly, the investment figure provided by the carrier will be used at this time. Our valuation staff has used the same data in providing valuation figures for present purposes.

In one aspect, the investment data shown on Appendix 2 differs from figures supplied by certain carriers in that it does not include an amount for working capital. Not all of the carriers reported working capital as part of their investment. Those that did appear to have used no consistent standard. For this reason, and because a satisfactory basis for judging the carriers' working capital needs has not been shown, we have omitted it from the investment figures.[3] We believe that our action in this respect is more than compensated by our liberality in not averaging down the investment figures for depreciation over the first few years.

Having the basic data at hand, we turn now to the question of rate computation.

In justifying the filed tariff rates, the carriers contend that the proposed rates are merely sufficient to cover expenses and interest and to allow an after-tax return on equity equal to 7 percent of their valuation. They consider this method of gauging a return on equity to be permissible since it is used in the 1941 consent agreement between the Justice Department and a large number of shipper-owned pipelines.

However, the consent decree standard has never been employed in a Commission proceeding as the test of rea-

[3] An allowance for working capital has, however been included in the staff evaluation estimates reflected in Appendix 2.

sonableness of rates. Its sole legal status is as a limit on the amount of dividends that pipelines may pay to shipper owners without risking prosecution under the Elkins Act for illegal rebates. Moreover, as a standard of reasonableness, it has nothing to recommend it from a conceptual standpoint. Although valuation is a measure of the entire investment, the consent decree standard allows a return on valuation to be used entirely to compensate one segment of the capital invested. Such a standard can have no relationship, except by coincidence, to the carriers' true capital costs. As shown in Appendix 3, the filed rates would produce returns on equity ranging from 31 percent to 96 percent. Accordingly, it can be seen that the tariff rates would produce returns exceeding capital costs, even where the carriers' own expense and investment data are accepted.

Inasmuch as the carriers' justification does not appear satisfactory, we must next consider what standards would be appropriate based on our own precedents. As we noted in No. 35533, *Petroleum Products, Williams Brothers Pipe Line Company*, —— I.C.C. —— (1976), the standards we have applied in the past have been an 8 percent return on valuation for crude oil pipelines and 10 percent on valuation for petroleum products pipelines.

At the outset, we have questions about the appropriateness of an 8 percent return in this instance, where annual interest rates generally exceed 8 percent. The small margin of earnings in excess of interest that would result is demonstrated in Appendix 4. As may be seen, rates computed on this basis would range from $3.74 for BP to $4.16 for Exxon. Further study of this table shows that five of the eight carriers would have returns on equity of 10 percent or less under this standard, and returns for some would be lower than 3 percent. Such a return would be unreasonably low.

It should be noted that the 8 percent on valuation standard arose in the early 1940's, when capital costs were substantially lower than they are today. It could continue to provide a substantial return on original investment to established carriers, whose valuations have risen well above their actual investment because of inflation. In the case of the TAPS carriers, however, their property was constructed so recently that valuation is little higher than actual cost, and an 8 percent return on valuation becomes quite deficient.

The question arises, then, as to whether the Commission can permissibly depart from its previous standards in these proceedings. The answer lies in the fact that, whatever standards we use, the earnings allowed to the carriers must comply with governing judicial requirements. The controlling standard, set forth in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944), is that a regulated firm must be allowed enough revenue not only for operating expenses, but also for the capital costs of the business. Such revenue must cover service on the debt and a return on equity sufficient to attract capital. [See also section 15a(2).]

For the purposes of the present decision, we have determined that the standard of a 10 percent return on valuation for petroleum products pipelines is appropriate for the TAPS carriers. Our selection of the 10 percent return on valuation standard is based primarily on two factors. One is that the magnitude and inherent attributes of the TAPS project produce a higher risk factor than is normal in crude oil pipeline operations. Many of the construction features are being tested for the first time. Geographic terrain, environmental and temperature problems, possible earthquakes, vulnerability to sabotage, future oil pricing policies, and regulatory uncertainty are among the factors to be considered. More

over, a 10 percent return on valuation appears generally sufficient to cover estimated capital costs. As previously noted, an 8 percent return on valuation produces generally insufficient returns on equity.

As shown in Appendix 5, a 10 percent return on valuation produces for the individual carriers on their actual capital structure returns on equity ranging from 13.3 percent to 54.3 percent, with no figure for Mobil which claims to be totally debt financed. The composite return on equity is 23 percent.

While these returns on equity have been challenged by protestants, the carriers note that they have an abnormally high proportion of debt in their capital structures, which is made possible by the fact that their debt obligations are unconditionally guaranteed by their parent oil companies. The carriers would argue that tariff rates based on 10 percent return on valuation provide a much lower return on equity with a more normal capital structure.

Although the 10 percent return on valuation appears suitable for present purposes, we stress that it is not intended to be a general standard nor to be a prejudgment of criteria to be used upon the conclusion of the investigation in these proceedings, nor is it in any way to be considered a prejudgment of the issues in Ex Parte No. 308.

Conditions for the acceptance of interim rate filings. The Bureau of Investigations and Enforcement asks that the carriers be required to produce a number of types of documents as a condition to our acceptance of interim rates. The carriers, however, contend that BIE's proposed condition is an attempt to circumvent the Commission's established discovery rules, and should not be adopted.

Order of Interstate Commerce Commission Suspending Tariffs and Authorizing Interim Rates.

We have concluded not to impose the requested condition in the present order. We do not believe that such orders are a necessary subject for inclusion in an order disposing of petitions for suspension of a tariff. Any future request for orders can be handled as separate matters later, when all factors concerning the production of the requested data can be properly considered. In addition, we note that at oral argument, the carriers indicated their willingness to cooperate in the production of documents. We shall expect them to abide by this agreement.

The other condition requested by protestants pertains to possible refunds of excess charges collected. We recognize that even the lower interim rate levels may prove upon investigation to exceed reasonable levels. Therefore, as a condition to filing such interim rates, we will require that the carriers keep account of the amounts collected under the interim rates or the proposed rates should they become effective and that they agree to refund any portion of such amounts that may ultimately be established as excessive.

Immediately prior to the oral argument on June 27, 1977, the Department of Justice filed a memorandum in reply to the responses of the carriers together with a motion for leave to file. Neither the special procedure adopted in this case nor our rules of practice contemplate replies to replies and the motion for leave to file is denied.

In the paragraphs below, the tariffs of Phillips Alaska Pipeline Corporation are not included. As noted in Appendix 1, a separate order with respect to Phillips will be issued before July 20, 1977.

It is ordered, That the operation of the schedules authorized below be, and it is hereby, suspended, and that the use thereof in interstate or foreign commerce be

Order of Interstate Commerce Commission Suspending Tariffs and Authorizing Interim Rates.

deferred from June 30, 1977, and to and including January 29, 1978, except as to I.C.C. 2, published by Amerada Hess, which bears a July 1 effective date and the operation of which is suspended to January 31, 1978, unless otherwise ordered by this Commission;

AMERADA HESS PIPELINE CORPORATION
I.C.C. NO. 2

ARCO PIPE LINE COMPANY
I.C.C. NO. 1030
on page 14, the rate of $6.04

BP INDUSTRIES, INC.
I.C.C. NO. 2

EXXON PIPELINE COMPANY
I.C.C. NO. 125

MOBIL ALASKA PIPELINE COMPANY
I.C.C. NO. 2

SOHIO PIPE LINE COMPANY
I.C.C. NO. 742
on the title page, the rate of $6.16

UNION ALASKA PIPELINE COMPANY
I.C.C. NO. 2

It is further ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates contained in the suspended schedules, as aforesaid, as well as the interim schedules authorized to be filed, pursuant to section 15(1) and section 15(7), with a view to making such findings and orders in the premises as the facts and circumstances shall warrant. In the event the schedules here under investigation are changed, amended or reissued, upon termination of the suspension period and the investigation not having been concluded, such changed, amended or reissued schedules will be included in this investigation.

Order of Interstate Commerce Commission Suspending Tariffs and Authorizing Interim Rates.

It is further ordered, That the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said rates under the Interstate Commerce Act.

It is further ordered, That the named carriers be, and they are hereby, authorized to file, upon not less than one day's notice, interim rates not exceeding the following amounts:

Amerada Hess Pipeline Corporation	$4.85
Arco Pipe Line Company	4.91
BP Pipelines Inc.	4.68
Exxon Pipeline Company	5.10
Mobil Alaska Pipeline Company	4.84
Sohio Pipe Line Company	4.70
Union Alaska Pipeline Company	4.89

subject, however, to the condition that the carriers keep account and that (1) the interim tariffs contain a refund provision to the effect that if the rates charged exceed the rates subsequently authorized or prescribed by the Interstate Commerce Commission, the carriers will refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed by the Interstate Commerce Commission with interest computed in accordance with section 15(8)(e) of the act, added by the Railroad Revitalization and Regulatory Reform Act of 1976; and (2) that the carriers file (effective on not less than 1 day's notice) a similar refund provision applicable to the original proposed rates. Although that section does not apply to pipelines, it represents the latest expression of Congressional interest, and the Commission's notice of April 14, 1977 indicated its applicability to all carriers under Part I. It should also be noted that the carriers at the oral argument expressed assent to an even higher rate of interest in the event of an investigation without suspension. Under the circumstances, we believe interest computed in accordance with section 15(a)(e) would be fair to all parties.

Order of Interstate Commerce Commission Suspending Tariffs and Authorizing Interim Rates.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be served upon the carriers parties to the said schedules, and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission. (Commissioner Brown approves the order except insofar as it denies the motion of the Department of Justice for leave to file a response to the carriers' responses).

H. G. HOMME, JR.,
Acting Secretary.

[SEAL]

APPENDIX 1

INITIAL TARIFFS APPLICABLE TO THE TRANS ALASKA PIPELINE SYSTEM

Carrier	Tariff No.	Filing Date	Effective Date
Amerada Hess Pipeline Corporation	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 1, 1977 June 1, 1977	July 1, 1977 July 1, 1977
Arco Pipeline Company	I.C.C. No. 1030	May 27, 1977	June 30, 1977
BP Pipelines, Inc.	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 3, 1977 June 3, 1977	June 20, 1977 June 30, 1977 [1]
Exxon Pipeline Company	I.C.C. No. 124 (rules) I.C.C. No. 125 (rate)	June 8, 1977 June 8, 1977	June 20, 1977 June 30, 1977
Mobil Alaska Pipeline Company	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 10, 1977 June 10, 1977	June 20, 1977 June 30, 1977 [1]
Phillips Alaska Pipeline Corporation	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 20, 1977 June 20, 1977	July 20, 1977 [2] July 20, 1977 [2]
Sohio Pipeline Company	I.C.C. No. 762	June 3, 1977	June 30, 1977 [1]
Union Alaska Pipeline Company	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 15, 1977 June 15, 1977	June 30, 1977 June 30, 1977

Tariff rules filed by all of the named carriers except Phillips were placed under investigation in No. 36611 by order of the Commission served June 17, 1977. Consideration of the rates filed by those carriers was deferred to the present order.

1. Postponed from June 20, 1977.
2. Because of the later effective date of these tariffs, the time for filing protests and replies to them has not yet expired. The question of their suspension or investigation will be the subject of a separate order by the Commission, to be issued prior to July 20, 1977.

Order of Interstate Commerce Commission
Suspending Tariffs and Authorizing Interim Rates.

APPENDIX 2
I & S No. 9164

BASIC CARRIER DATA
(000 omitted)

		EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Operating Costs	Total	$1,920[1]	19,889[1]	6,189[1]	185,200[1]	6,499[1]	419,944
	Per Barrel	.085	.869	.844	.928	.894	.938
Renewal Costs	Total	8,302[2]	8,008[2]	697[2]	13,999[2]	697[2]	41,960
	Per Barrel	.066	.066	.095	.066	.096	.094
Investment	Total	1,627,000[3]	459,920[3]	147,969[3]	3,159,500[3]	142,985[3]	9,258,475
	Per Barrel	20.970	20.082	20.188	21.492	19.665	21.151
Depreciation	Total	73,700[4]	18,000[4]	6,061[4]	126,200[4]	5,750[4]	372,586
	Per Barrel	.941	.926	.884	.884	.791	.851
Debt	Total	1,431,250[5]	459,600[6]	139,000[6]	2,707,500[5]	128,439[5]	8,034,480
	Per Barrel	18.559	20.082	18.504	18.541	17.685	18.344
Interest	Total	114,400[4]	32,674[4]	10,125[4]	202,480[4]	9,369[4]	699,525
	Per Barrel	1.507	1.492	1.398	1.729	1.289	1.574
Interest Rate		8.000%[7]	7.111%[7]	8.498%[7]	9.325%[7]	7.295%[7]	8.552%
Equity	Total	406,750[8]	-0-[8]	27,969[8]	431,000[8]	14,546[8]	1,233,996
	Per Barrel	4.932	-0-	3.764	2.961	2.001	2.817
Valuation	Total	1,927,500[9]	494,500[9]	166,200[9]	3,271,000[9]	155,900[9]	9,733,600
	Per Barrel	22.113	22.133	21.758	22.402	21.441	22.223
		77.9/22.1	100.0/0.0	81.4/18.6	86.3/13.7	89.8/10.2	86.7/13.3

		AM. HESS	ARCO	BP	
Operating Costs	Total	6,500[1]	90,250[1]	64,727[1]	
	Per Barrel	.899	.981	.988	
Renewal Costs	Total	629[2]	8,613[2]	6,668[2]	
	Per Barrel	.096	.094	.096	
Investment	Total	144,081[3]	1,921,850[3]	1,467,240[3]	
	Per Barrel	21.923	21.033	21.148	
Depreciation	Total	5,784[4]	77,247[4]	59,784[4]	
	Per Barrel	.876	.840	.865	
Debt	Total	119,997[5]	1,814,627[5]	1,355,947[5]	
	Per Barrel	17.998	19.731	19.103	
Interest	Total	11,288[4]	140,200[4]	110,289[4]	
	Per Barrel	1.718	1.534	1.714	
Interest Rate		9.651%[7]	7.729%[7]	9.466%[7]	
Equity	Total	27,074[8]	110,963[8]	211,293[8]	
	Per Barrel	4.121	1.179	3.045	
Valuation	Total	149,000[9]	2,036,000[9]	1,541,900[9]	
	Per Barrel	22.664	22.135	22.214	
Debt/Equity		81.2/18.8	89.0/11	85.6/14.4	77.9/

Order of Interstate Commerce Commission
Suspending Tariffs and Authorizing Interim Rates.

FOOTNOTES TO BASIC CARRIER DATA

Amerada Hess

1. Reported in undated statement submitted by Amerada Hess entitled "General Assumptions for Calculating TAPS Tariff as of May, 1977."
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Amerada Hess' ownership share (1.50 percent).
3. Amerada Hess' share (1.50 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Amerada Hess' capitalized construction interest ($22,670,500) and capitalized overhead costs ($1,735,400) as reported by letter from R. K. Stafford dated May 13, 1977.
4. Reported in letter from R. K. Stafford dated June 1, 1977.
5. Reported in "General Assumptions" statement.
6. Reported in "General Assumptions" statement.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Arco

1. Reported in letter from J. D. Wessling dated June 1, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Arco's ownership share (21 percent).
3. Arco's share (21 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Arco's capitalized construction interest ($257,100,000), as reported in letter from J. D. Wessling dated June 1, 1977.
4. Reported in letter dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in June 1, 1977 letter.
7. Weighted average interest rate of debt issues shown in a letter from J. D. Wessling dated June 2, 1977.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

BP

1. Reported in BP's submission of June 15, 1977, in explanation of filed tariff rates.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by BP's ownership share (15.84 percent).
3. BP's share (15.84 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus BP's capitalized

construction interest and overhead costs ($204 million), with the latter as reported in BP's submission of June 15, 1977.
4. Reported in BP's submission of June 15, 1977.
5. Investment less equity.
6. Reported in a leter from P. H. Jones dated May 27, 1977.
7. Interest divided by debt.
8. Reported in a letter from P. H. Jones dated June 14, 1977.
9. Staff estimate based on reported investment figures.

Exxon

1. Reported in Appendix A to Exxon's reply to protests.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Exxon's ownership share (20 percent).
3. Exxon's share (20 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Exxon's capitalized construction interest ($242 million), with the latter as reported in a letter from J. D. Sturtevant dated March 21, 1977.
4. Reported in a letter from J. D. Sturtevant dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in Appendix A to Exxon's reply to protests.
7. Reported in Appendix A to Exxon's reply to protests.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Mobil

1. Reported in a letter from C. R. Thompson dated May 27, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Mobil's ownership share (5 percent).
3. Mobil's investment, including capitalized construction interest ($57.7 million) and capitalized overhead costs ($3.2 million) as reported in a letter from C. R. Thompson dated April 29, 1977.
4. Reported in letter dated May 27, 1977.
5. Debt presumed to be 100 percent of investment. Data filed by Mobil gives no indication of equity financing.
6. Reported in letter dated May 27, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Phillips

1. Reported in a letter from James Mullen dated July [sic; June] 20, 1977.

2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Phillips' ownership share (1.66 percent).
3. Phillips' share (1.66 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Phillips' capitalized construction interest ($14,944,000) and capitalized overhead costs ($40,000), with the latter items as reported in letter of June 20, 1977. Working capital ($1,480,000) excluded.
4. Reported in undated statement entitled "Phillips Petroleum Company—Estimate of Expenses."
5. Reported in letter of June 20, 1977.
6. Reported in letter of June 20, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Sohio

1. Reported in a letter from J. T. Boltacz dated June 13, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Sohio's ownership share (33.34 percent).
3. Sohio's investment (3,138.5 million) as reported in letter dated June 13, 1977. Working capital ($13 million) excluded. Subtracting Sohio's share of Alyeska investment would indicate $479,635,000 as capitalized construction interest and overhead costs.
4. Reported in letter dated June 13, 1977.
5. Reported in letter dated June 13, 1977.
6. Reported in letter dated June 13, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Union

1. Reported in a letter dated May 27, 1977, from E. J. Takach.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Union's ownership share (1.66 percent).
3. Union's share (1.66 percent) of Alyeska investment ($7,975 for facilities plus $16 million for land), plus Union's capitalized construction interest ($10.6 million), with the latter as reported in a letter from David M. Schwartz dated June 14, 1977.
4. Reported in letter dated May 27, 1977.
5. Reported in letter dated June 14, 1977.
6. Computed from debt description in letter dated June 14, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

APPENDIX 3
EFFECTS OF FILED TARIFF RATES

I & S No. 9164

	AMERADA HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Rate)	6.440	6.040	6.350	6.270	6.310	6.220	6.160	6.090	6.211
Less:									
Operating Costs	.969	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Taxes	1.461	1.375	1.452	1.535	1.585	1.615	1.346	1.598	1.456
Return on Equity	1.300	1.224	1.293	1.456	1.412	1.438	1.199	1.422	1.296
Percentage Returns:									
On Equity	31.5%	96.2%	42.5%	31.4%	(no equity)	38.2%	40.6%	71.1%	46.0%
On Total Investment	13.8%	13.1%	14.2%	13.2%	13.8%	14.0%	13.6%	13.8%	13.6%
On Valuation	13.3%	12.4%	13.5%	12.5%	13.1%	13.0%	13.1%	12.7%	12.9%

I&S No. 9164

APPENDIX 4
TARIFF COMPUTATION
ALLOWING 8 PERCENT RETURN ON VALUATION—ACTUAL CAPITAL STRUCTURE

	AM HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (RATE)	3.861	3.965	3.739	4.160	3.908	3.805	3.749	3.975	3.892
Less:									
Operating Cost	.969	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Tax	.107	.277	.071	.519	.312	.390	.071	.479	.229
Return on Equity	.095	.247	.063	.462	.278	.348	.063	.426	.264
Percentage Returns:									
On Equity	2.3%	19.4%	2.1%	10.0%	(no equity)	9.2%	2.1%	21.3%	7.2%
On Total Investment	8.3%	8.4%	8.4%	8.4%	8.4%	8.0%	8.3%	8.7%	8.4%
On Valuation	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%

Order of Interstate Commerce Commission Suspending Tariffs and Authorizing Interim Rates.

APPENDIX 5
TARIFF COMPUTATION
ALLOWING 10 PERCENT RETURN ON VALUATION—ACTUAL CAPITAL STRUCTURE

	AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Rate)	4.847	4.906	4.681	5.100	4.842	4.829	4.700	4.885	4.835
Less:									
Operating Costs	.989	.981	.968	.985	.899	.844	.926	.894	.938
Depreciation	.276	.340	.362	.341	.326	.334	.364	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.807	1.492	1.388	1.729	1.289	1.574
Less Taxes	.616	.775	.589	1.016	.909	.879	.574	.960	.728
Return on Equity	.548	.690	.507	.905	.720	.783	.511	.855	.648
Percentage Returns:									
On Equity	13.80%	54.25%	16.65%	19.54%	(no equity)	20.80%	17.22%	42.73%	23.00%
On Total Investment	10.24%	10.54%	10.50%	10.55%	10.54%	10.74%	10.42%	10.90%	10.50%
On Valuation	10%	10%	10%	10%	10%	10%	10%	10%	10%

Affidavit of C. R. Thompson, Controller and Treasurer of Mobil Alaska Pipeline Co., in Support of Application for Temporary Restraining Order, July 6, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

AFFIDAVIT

CHARLES R. THOMPSON, being duly sworn, deposes and says

1. I am a Certified Public Accountant and Controller and Treasurer of Petitioner Mobil Alaska Pipeline Company and make this affidavit in support of the Application for Temporary Restraining Order and Application and Motion for Interlocutory Injunction filed herewith.

2. I have examined the Interstate Commerce Commission's Order of June 28, 1977, in No. 36611 ("Order") and the petitions and protests of the State of Alaska and the Arctic Slope Regional Corporation. Based on the differences between the carrier-initiated TAPS rates suspended in the Order and the "interim" rates authorized therein, I have prepared Appendix A to petitioner's memorandum in support of its applications for temporary restraining order and interlocutory injunction.

3. I computed for each TAPS owner the difference between its own rate (Column 2) and the "interim" rate authorized in the Order (Column 3). The reduction in the rate to the Commission's "interim" rate, expressed in dollars per barrel of crude oil shipped, for each TAPS owner is set forth in Column 4.

4. Assuming a throughput of 1.2 million barrels per day through TAPS for a period of seven months (210 days), I computed the total barrels of crude which would be shipped through TAPS during a seven-month suspen-

Affidavit of C. R. Thompson, Mobil Alaska.

sion period. Multiplying that figure by the percentage ownership interest of each TAPS owner in TAPS (Column 1) I calculated the barrels each TAPS owner would ship during a suspension period of seven months (Column 5). Multiplying the total barrels for each TAPS owner by that owner's reduction in revenue per barrel I obtained the total revenue reduction for each TAPS owner (Column 6).

5. Based on the assumption that the total reductions in revenue for all TAPS owners, $343,335,000, would cause an equivalent increase in the wellhead value of crude oil, I calculated the total amount of increased revenues to the State of Alaska from the use of the "interim" rates during a seven-month suspension period. Since Alaska owns a 12.5% royalty interest in the wellhead value of crude to be shipped through TAPS, by multiplying 12.5% by the total revenue reduction for TAPS (Column 6) I obtained a figure representing the maximum royalty benefit to the State from operations at the Commission's "interim" rate levels during a seven-month period (Column 7).

6. The Arctic Slope Regional Corporation ("ARSC") has a right to a total of $500,000,000 of Alaska's royalty interest in the wellhead value of the crude accumulated by payment from Alaska of 2% of its own royalty interest (.02 x .125 = .0025 or .25%). By multiplying Column 7 by 2% I obtained a figure representing the maximum benefit to the ARSC from operations at the Commission's "interim" rate levels during a seven-month period (Column 8).

Date: July 2, 1977

CHARLES R. THOMPSON

[Sworn to on July 2, 1977.]

Affidavit of C. R. Thompson, Mobil Alaska.

APPENDIX A

MOBIL ALASKA PIPELINE COMPANY

COMPARISON OF REVENUE REDUCTION AND ROYALTY INCREASE TO ALASKAN NATIVES DURING 7-MONTH SUSPENSION PERIOD RESULTING FROM THE INTERSTATE COMMERCE COMMISSION ORDER 36611 SUSPENDING RATES FILED BY COMPANIES PROPOSING TO OPERATE AS COMMON CARRIERS OVER THE ALASKA PIPELINE SYSTEM AND AUTHORIZING THE FILING OF RATES NOT TO EXCEED STIPULATED AMOUNTS

$ in 000's

	-1-	-2-	-3-	-4-	-5-	-6-	-7-	-8-
		Proposed Tariff vs Authorized $/Bbl					Royalty Increase	
Owner (Carrier)	Owner Percent	Prop.	Auth.	Reduction	Barrel (a) (millions)	Revenue Reduction (4 x 5)	Total 6 x 12.5%	Alaskan Natives Share (d) (7 x 2%)
Amerada Hess Pipeline Corporation	1.50%	$6.44	$4.85	$1.59	3.8	$ 6,010		
Arco Pipe Line Company	21.00	6.04	4.91	1.13	52.9	59,800		
BP Pipelines, Inc.	15.84	6.35	4.68	1.67	39.9	66,661		
Exxon Pipeline Company	20.00	6.27	5.10	1.17	50.4	58,968		
Phillips Alaska Pipeline Corporation	1.66	6.22	(b)	1.36(c)	4.2	5,689		
Sohio Pipe Line Company	33.34	6.16	4.70	1.46	84.0	122,665		
Union Alaska Pipeline Company	1.66	6.09	4.89	1.20	4.2	5,020		
Sub Total	95.00				239.4	$324,813	$40,602	$812
Mobil Alaska Pipeline Company	5.00	6.31	4.84	1.47	12.6	18,522	2,315	46
Total All Carriers	100.00%				252.0	$343,335	$42,917	$858

(a) Based on 1.2 million barrels daily for 7 months (210 days)
(b) Not acted upon yet
(c) Based on weight average reduction for all carriers other than Phillips Alaska Pipeline Corporation
(d) Alaska Natives Claims Settlement Act, USC Sec. 1608

Affidavit of Dale A. Lucas, Manager of Transportation of BP Pipelines Inc., in Support of Application for Temporary Restraining Order, July 11, 1977.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

AFFIDAVIT

THE STATE OF TEXAS }
COUNTY OF HARRIS }

DALE A. LUCAS, being duly sworn, deposes and says:

I am Manager of Transportation of BP Pipelines Inc. ("BP"), the petitioner in this proceeding. I make this affidavit in support of BP's motion for an order staying, restraining and suspending an order of the Interstate Commerce Commission which suspends for seven months tariffs filed by BP with the Commission for the transportation of crude oil in the Trans-Alaska Pipeline System ("TAPS").

BP owns an 15.84% undivided interest in TAPS. Schedule A to this affidavit shows projected operating results for BP for its share of TAPS over the seven-month period ending January 31, 1978, the approximate period of the suspension ordered by the I.C.C.

The figures appearing on this Schedule A are compiled from data furnished by BP to the I.C.C., on which the I.C.C. bases the calculations appearing in the appendices to its order now under review.

The figures on Schedule A reflect a build-up over the period covered in the amount of oil to be transported by BP. The I.C.C.'s calculations are based on operation for a full year at a rate which our figures show will not actually be reached until late in the suspension period. By the I.C.C.'s approach, BP would transport about 35 million barrels over the suspension period; actually, as Schedule

Affidavit of Dale A. Lucas, BP Pipelines.

A shows, we estimate BP will transport only 25.75 million barrels over that period, with correspondingly less revenue.

Schedule A shows operating results based on two different tariff rates. The figures in the right-hand column use the $6.35 initial rate tariff filed by BP, which the I.C.C. has suspended. The figures in the left-hand column use the $4.68 rate which the I.C.C. has said it would approve. As Schedule A shows, under the I.C.C. suggested rate BP's revenues would be, over the seven-month suspension period, $43 million less than under BP's suspended tariff.

In fact, as Schedule A shows, the $4.68 tariff will result in a net loss to BP of about $3.6 million over the seven-month suspension period.

D. A. LUCAS

[Sworn to on July 8, 1977.]

Affidavit of Dale A. Lucas, BP Pipelines.

SCHEDULE A

BP PIPELINES INC.

Operating Results for Seven Month
Period Ending January 31, 1978
(Operations Commencing August 1, 1977)
($000)

Line No.	Description	Tariff Rates $4.68	Tariff Rates $6.35
	(a)	(b)	(c)
1	Throughput (thousand barrels)[1]	25,750	25,750
2	Operating Revenue	$120,510	$163,513
3	Operating Expense:		
4	Depreciation[1]	29,901	29,901
5	Dismantling/Restoration[2]	3,323	3,323
6	Other Operating Expenses[1]	33,052	33,052
7	Net Carrier Operating Income	$ 54,234	$ 97,237
8	Interest Expense[1]	57,833	57,833
9	Income Tax	—	20,840
10	Net Income (Loss)	$ [3,599]	$ 18,564

NOTES:

1. 1977 figure reported to the I.C.C., plus 1/12 of 1978 figure reported to the I.C.C. (as presented in explanation of initial tariff, dated June 15, 1977).

2. One-half annual amount applied by I.C.C. in Order of June 28, 1977.

Affidavit of Richard M. Voripaieff, Vice President—Administration and Treasurer of Exxon Pipeline Company, in Support of Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review, July 12, 1977.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

RICHARD M. VORIPAIEFF, being duly sworn, deposes and says:

That I am the Vice President—Administration and Treasurer of Exxon Pipeline Company.

That, to the best of my knowledge, information and belief as of the time Exxon Pipeline Company filed its I.C.C. Tariff No. 125, the anticipated revenue barrels to be transported through its undivided interest share of the capacity of the Trans Alaska Pipeline System for the period from July 26, 1977, through January 29, 1978, were as shown on Table 1 attached to this Affidavit. Since the filing of I.C.C. Tariff No. 125, an industrial accident occurred resulting in the loss of certain critical facilities at one of the pipeline system's pump stations. Thus, the anticipated revenue barrels for the period July 26, 1977, through January 29, 1978, will be substantially less than the previous estimate.

That, to the best of my knowledge, information and belief, the figures and calculations shown in Tables 2 and 3 attached to this Affidavit are correct.

RICHARD M. VORIPAIEFF

[Sworn to on July 11, 1977.]

Affidavit of R. Voripaieff, Exxon Pipeline.

TABLE 1

Exxon Pipeline Company
TAPS Anticipated Revenue Barrels
July 26, 1977 Through January 29, 1978

Scheduled Throughput

Date	Thousand Barrels
7-26	128
7-27	160
7-28	176
7-29	182
7-30	182
7-31	185
8-1	185
8-2	190
8-3	195
8-4	200
8-5	205
8-6	210
8-7	215
8-8	220
8-9	225
8-10	230
8-11	235
8-12	240
8-13 through 12-31-77	33,840
Total	37,403
Less: 10% for TAPS downtime, fuel and other factors	3,740
Working inventory in terminal tankage at 3 days throughput	720
Total Revenue Barrels Through 12-31-77	32,943
1-1-78 Through 1-29-78	6,960
Less: 5% for TAPS downtime, fuel and other factors	348
Total Revenue Barrels 1-1 through 1-29-78	6,612
Total Revenue Barrels During Period	39,555

Affidavit of R. Voripaieff, Exxon Pipeline.

TABLE 2

Minimum Rate for the Period June 30, 1977 through January 29, 1978 Using ICC Method Adjusted to Reflect Anticipated Throughput

	M $	$/bbl.
Return on Valuation @ 10% (includes both net income after taxes and gross interest expense)	$ 99.8	$2.520
Operating Expenses	25.8	.651
Ad Valorem Taxes	14.4	.363
Book Depreciation	36.6	.924
TAPS Dismantling	4.3	.109
Provision for Income Taxes	46.6	1.177
Total Revenue	$227.5	$5.744

Affidavit of R. Voripaieff, Exxon Pipeline.

TABLE 3

Minimum Rate for the Period June 30, 1977 through January 29, 1978 Using ICC Method Adjusted to Reflect Anticipated Throughput, Anticipated Dismantling Expense, and Anticipated Income Taxes

	M $	$/bbl.
Return on Valuation at 10% (includes both net income after taxes and gross interest expense)	$ 99.8	$2.520
Operating Expense	25.8	.651
Ad Valorem Taxes	14.4	.363
Book Depreciation	36.6	.924
TAPS Dismantling	8.1	.205*
Provision for Income Taxes	46.9	1.187**
Total Revenue	$231.4	$5.850

* Based on $16.4 million annual removal costs for Exxon prorated on the basis of an average throughput of 211,000 barrels per day for the interim period (total revenue barrels of 39,555,000 for Exxon as shown in Table 1).

** Based on increased dismantling expenses shown above.

"Appendix A" to Memorandum of Exxon Pipeline Co. In Support of Application for Injunction: Verified Statement of Ernest C. Terry, C.P.A. of Exxon Pipeline Co. Describing Calculation of Tariff Rates for Trans Alaska Pipeline as Submitted to Interstate Commerce Commission, July 12, 1977.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

STATEMENT OF ERNEST C. TERRY

My name is Ernest C. Terry. I am employed by Exxon Pipeline Company. I graduated from Southern University in New Orleans in 1964 with a bachelor of Science degree in Accounting. Following graduation, I was employed for three years with the Kaiser Aluminum and Chemical Corporation as a Cost Accountant. In 1967, I joined Johnson and Johnson as a Supervisory Accountant. In May 1969, I was employed by the Humble Oil & Refining Company (now Exxon Company, U.S.A., a division of Exxon Corporation) as a Budget and Cost Accountant in the Production Department and was later transferred to the Controller's corporate staff. Subsequently, I was assigned to the Marketing Department as a Financial Reporting Supervisor. In 1976, I was employed by the Exxon Pipeline Company. In my various assignments, I have had experience in long-range forecasting, investment evaluation and financial analysis, both near-term and long-term.

I am a Certified Public Accountant (CPA), and member of the American Institute of Certified Public Accountants and the National Association of Black Accountants.

In my present assignment, my duties include budget development, long-range financial planning and development of tariff rates for Exxon Pipeline Company's interest in the Trans Alaska Pipeline System.

In my statement, I will describe the procedure employed in the computation of the initial tariff rate filed by Exxon

Pipeline Company. Specifically, my testimony will cover (1) computation of an estimated ICC valuation, (2) description of the elements used in the development of the rate, (3) computation of the rate and (4) the latest earnings forecast for Exxon Pipeline Company attributable to its interest in the Trans Alaska Pipeline System for the years 1977 and 1978 based on the rate filed.

The initial rate was developed and computed using the traditional guidelines of the Interstate Commerce Commission as described to me by the Exxon Pipeline Company legal advisors, applying, however, an earnings limitation of 7% on estimated ICC valuation consistent with the Pipeline Consent Decree.

It was necessary to compute an estimated ICC valuation for Exxon Pipeline Company's interest in the Trans Alaska Pipeline System in order to compute an initial tariff rate. In computing the estimated ICC valuation, the general guidelines reported by the Interstate Commerce Commission in Ex Parte No. 308 as shown in the testimony of Jesse C. Oak, Senior Valuation Engineer, Bureau of Accounts, of the Interstate Commerce Commission were followed. Attachment I to this statement shows the computation of the estimated ICC valuation used for the 1978 computation. The estimated valuation for Exxon Pipeline Company's 20% interest in the Trans Alaska Pipeline System is $1,976.5 million. The general guidelines given by Mr. Oak, his description of the elements of valuation and the method used by Exxon Pipeline Company to estimate valuation are:

(1) Cost of Reproduction New. Mr. Oak described this as "the estimated cost of reproducing substantially the identical or similar property constructed in a prior period at a price level as of a subsequent

date." Attachment II shows the computation of an estimated cost of reproduction new. Column 1 shows original cost by year of expenditure and Exxon Pipeline Company's 20% share. To this 20% share, estimated interest capitalized during construction was added. Column 2 lists the annual indices issued by the Interstate Commerce Commission for the years 1969 through 1975 and estimated indices for the years 1976 through 1978. The indices for 1976 through 1978 were estimated by compounding the 1975 index by 6% inflation factor. Column 3 is the reciprocal of Column 2. Column 4 reflects the 1947 Period Prices calculated by multiplying Column 1 times Column 3. Column 5, 1977 Period index, was determined by taking the average of the annual indices for the five-year period, 1974 through 1978. Column 6 shows the computation of the estimated cost of reproduction new for the Trans Alaska Pipeline System and Exxon Pipeline Company's 20% share. An interest amount was added to this 20% share. Two factors were considered in calculating the interest:

(a) a predetermined annual interest rate, and

(b) an estimated construction period.

The annual interest rate presently allowed by the ICC for this purpose is six (6) percent. The construction period considered was approximately 39 months. The interest additive was arrived at by applying six (6) percent for one-half of the construction period plus three months to the cost of reproduction new. The estimated cost of reproduction new for Exxon Pipeline Company's interest in the Trans Alaska Pipeline System is $1,877.0 million.

Verified Statement of E. Terry, Exxon Pipeline.

(2) Cost of Reproduction New Less Depreciation. Mr. Oak described this as "a value arrived at after giving consideration to the effects of observed physical wear, decay and functional inadequacy or obsolescence." Since the Trans Alaska Pipeline System is a newly constructed pipeline facility, the cost of reproduction new less depreciation was assumed to be the same as cost of reproduction new.

(3) Original Cost. Mr. Oak described the original cost as "the actual cost of construction or acquisition of property to the first person or corporation dedicating such property to public use." Exxon Pipeline Company used the original cost number received from Alyeska Pipeline Service Company. These estimated costs were furnished to the Commission by letter dated April 27, 1977 and are shown on Attachment III. More recent estimates from Alyeska Pipeline Service Company show these costs to be slightly higher. Nevertheless, for the purpose of our estimate we have used the estimate previously provided the Interstate Commerce Commission.

(4) The Present Value of Land. Mr. Oak described this as "a present fair average market value of all parcels of land owned or used by a carrier in common carrier services." For the purpose of this estimate, the original cost of land as reported by Alyeska Pipeline Service Company was used. Exxon Pipeline Company's share of this cost was $.6 million dollars and consistent with Mr. Oak's guidelines, half of this amount was used in estimating an initial valuation.

(5) Present Value of Rights of Way. Mr. Oak described this as "the unamortized balance of carrier's cost paid for an easement across a landowner's property." For the purpose of this estimate, Exxon Pipeline Company's share of the original costs of rights of way were used. This amount was $.2 million.

Verified Statement of E. Terry, Exxon Pipeline.

(6) Working Capital. Mr. Oak described working capital as consisting of "investment in material and supplies suitable and intended for maintenance and operation and a fund of money necessary to meet current operating demands which much be supplied in addition to the receipts of common carrier operations." In Exxon Pipeline Company's letter to the Interstate Commerce Commission of June 1, 1977 (Attachment IV), working capital was estimated to be $8 million and this was used in estimating valuation.

(7) Going Concern Value. Mr. Oak described this as "an intangible value of an assembled and established pipeline doing business, as compared with one which has not yet commenced operation." Mr. Oak stated in his testimony that the Commission has used in pipeline valuation 6% of the value of depreciable property before adding the amount for present value of land, present value of rights of way and working capital. Exxon Pipeline followed this procedure in estimating valuation.

Using the estimated valuation, a tariff rate was calculated for a full year's operation at the maximum throughput levels. At the time the tariff rate was calculated, the Trans Alaska Pipeline System was expected to receive line fill on June 20, 1977. Because of the uncertainty of initial throughput and operating conditions through year end

1977, a rate based on 1977 was not calculated. A comparable rate for that period would be higher than a tariff rate during a full year of operation. A rate of $6.53 per barrel was computed for the year 1978. Attachment V shows the computation of that rate.

The elements that were used in developing the 1978 rate were:

(1) *Operating Expenses*

Sheet 3 of Attachment IV shows the forecasted expenses for 1978. Operating expenses are composed of Alyeska Pipeline Service Company's estimated field and administrative costs, Exxon Pipeline Company's estimated cost of fuel for operations, ad valorem taxes and other required support costs. Details of the estimated operating expenses for 1978 were sent to the Interstate Commerce Commission in Exxon Pipeline Company's letter dated June 1, 1977. The more significant elements of each expense item are:

(a) Field and administrative costs include all costs items to be incurred such as personnel costs, catering, maintenance contracts, maintenance materials, commercially purchased fuel and power, communications, equipment and building rentals. Maintenance services will be primarily performed by outside contractors.

(b) Fuel Furnished in Kind. Exxon Pipeline forecasts that its share of natural gas requirements in 1978 will be 1.5 billion cubic feet. Exxon Pipeline's share of fuel extracted from topping plants for 1978 are forecasted to be approximately

.3 million barrels. This latter requirement will be secured from shippers in Exxon Pipeline's capacity. Tariff rules and regulations require payment to the shippers.

(c) Exxon Pipeline Company will require office personnel, data processing service, and other services to support the operation of the Trans Alaska Pipeline System. These costs are estimated at $725M dollars for 1978.

(d) Ad valorem taxes were estimated at 2% of gross investment in property, plant and equipment.

(2) *Depreciation*

Depreciation was calculated using the straight line method and a 25-year life. Details on the computation of depreciation were sent to the Interstate Commerce Commission by Exxon Pipeline Company's letter of April 27, 1977. (See Attachment III.) Cost of depreciable assets were computed to be $1,842.4 million. This includes Exxon Pipeline Company's 20% share of the latest estimated depreciable construction costs from Alyeska Pipeline Service Company of $8,003 million and includes $241.7 million which represents Exxon Pipeline Company's interest capitalized during construction.

(3) *Dismantling and Restoration*

The Federal and State of Alaska right-of-way permits require that upon the completion of use the permittees shall remove all aboveground facilities and restore the right of way to a condition satisfactory

to the Department of Interior and the State of Alaska. Assuming that all buried pipe can be left in place, Alyeska has estimated that the total cost in 1977 dollars to meet this requirement is $1,049 million (Exxon Pipeline's share is $209.8 million in 1977 dollars). Based on a six percent per annum inflation factor, Exxon Pipeline estimates this future cost to be $4,052 million (Exxon Pipeline's share is $900.4 million).

An amount required to recover these costs has been include in the rate in a manner that will result in no gain or loss to Exxon Pipeline. The amount to be included was calculated using sinking fund tables and an estimated earnings rate of 6% after income taxes on the reinvestment of funds collected. This earnings rate is essentially equivalent to the return available on high-grade tax-exempt municipal securities. On this basis, Exxon Pipeline will only collect $212.5 million after income taxes from shippers to fund a total cost before tax of $900.4 million.

(4) *Interest Expense*

Interest expense was included based on an Exxon Pipeline average interest rate of 8% on outstanding debt invested in its share of the Trans Alaska Pipeline System. For 1978, debt is estimated to be 80% of total capital expenditures including interest capitalized during construction.

(5) *Income Taxes*

Provision is made for income taxes taking into consideration a Federal tax rate of 48% and a State of Alaska tax rate of 9.4%.

(6) *Earnings on ICC Valuation*

For 1978, provision is made for earnings at 7% on Exxon Pipeline Company's estimated Interstate Commerce Commission's valuation for its interest in the Trans Alaska Pipeline System.

The tariff rate of $6.53 for the year 1978 as shown on Attachment V was computed by dividing the annual revenues by the throughput volumes for 1978. Throughput volume used for 1978 was 240,000 barrels per day, which represents Exxon Pipeline Company's 20% share of the initial design rate of the Trans Alaska Pipeline System of 1,200,000 barrels per day.

The $6.53 rate computed for 1978, if established as the initial rate, could require a reduction as of January 1, 1979 depending on the facts at that date. The adjustment would be required because of changes in expenses and the amount required to keep earnings within the 7% pipeline Consent Decree dividend limitations. To avoid the necessity of such an early change, the rate was computed which would allow Exxon Pipeline Company to maintain an earnings level that provides are reasonable return on the estimated valuation by limiting the earnings to the permissible dividend level under the three year carry forward provision for deficiencies as permitted by the pipeline Consent Decree. For the purpose of computing a rate on this basis, the first four full years, 1978-1981 was selected as the rate period. An ICC valuation for each of the additional three years was estimated in the same manner as the 1978 estimated valuation which was described earlier. Using these valuations and the same elements used in the 1978 rate computation, a rate of $6.27 was computed as shown on Attachment VI.

Verified Statement of E. Terry, Exxon Pipeline.

Throughput volumes for the four year period were calculated by using Exxon Pipeline Company's 20% share of the current design capacity of the Trans Alaska Pipeline System of 1,200,000 barrels per day for the years 1978 through 1980. Exxon Pipeline Company is currently forecasting an expansion of the system which, considering the necessary construction period, would be completed and available for service on July 1, 1981. For 1981, Exxon Pipeline Company throughput volumes were calculated at 240,000 barrels per day from January 1, 1981 to June 30, 1981 and 308,600 barrels per day from July 1, 1981 through December 31, 1981. Operating expenses for the years 1979, 1980 and 1981 were forecasted considering the mid-year 1981 expansion and by escalating the 1978 operating expense forecast made by Alyeska at 5% per year compounded.

For the year 1981, an additional amount of depreciation was added to cover the incremental cost of the expansion which is estimated at $90.7 million of which $81 million represents construction costs and $9.7 million represents interest capitalized. This latter capitalization was then depreciated over 21.2 years which represents the remaining life of the system at the time of the expansion.

The dismantling and restoration costs remain the same as 1978. Interest expense for the years after 1978 were calculated by retiring debt with 90% of the cash flow from book depreciation and deferred income taxes.

Using the $6.27 filed rate, a forecast of earnings was made for the remaining portion of 1977 and for the year 1978. In developing and computing the $6.27 rate, no provisions were made for the loss of revenues due to system downtime and other factors that could result in less than

Verified Statement of E. Terry, Exxon Pipeline.

100% of expected throughput. For the purpose of forecasting financial results for the remaining portion of 1977 and 1978, we estimate throughput at 90% of capacity for 1977 due to the uncertainties of start up and operating conditions; for the year 1978, a 95% factor was used. Attachment VII shows the forecast of revenues and expenditures for 1977 and 1978. The rate of return on estimated ICC valuation expected for the remaining portion of 1977 is 5.4% and the rate of return on estimated ICC valuation for the full year 1978 is 5.8%.

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT I

ESTIMATED INITIAL VALUATION

		$M
1.	Original Cost (Including Interest Capitalized)	$1,835.9
2.	Reproduction Cost New	$1,877.0
3.	Total of 1 and 2	$3,712.9
4.	Reproduction Cost New, less depreciation	$1,877.0
5.	Ratio of 1 to 3	49.45%
6.	Ratio of 2 to 3	50.55%
7.	Multiply 1 by 5	$ 907.8
8.	Multiply 2 by 6	$ 948.8
9.	Total of 7 and 8	$1,856.6
10.	Condition Per Cent (4 divided by 2)	100.0%
11.	Value of Depreciable Property (Multiply 9 by 10)	$1,856.6
12.	Going Concern and Other Intangibles (6% × 11)	$ 111.4
13.	Present Value of Land ($.6 M × ½)	$ .3
14.	Present Value of Rights-of-Way ($.2)	$ .2
15.	Working Capital	$ 8.0
16.	Estimated Valuation	$1,976.5

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT II

EXXON PIPELINE COMPANY
ESTIMATED "COST OF REPRODUCTION NEW" OF
TAPS PHASES I AND II

Year	(1) $M Expend.(1)	(2) Indices	(3) Reciprocal of Column 2	(4) $M 1947 Period Prices (Col 1x3)	(5) 1977 Period Index	(6) $M CRN (Col 4x5)
1969	35.0	191	.524	18.3	355	65.0
1970	180.0	198	.505	90.9	355	322.7
1971	109.0	211	.474	51.7	355	183.5
1972	49.0	221	.452	22.1	355	78.5
1973	47.0	235	.426	20.0	355	71.0
1974	856.0	279	.358	306.5	355	1,088.1
1975	2,772.0	343	.292	809.4	355	2,873.4
1976	2,653.0	364	.275	729.6	355	2,590.1
1977	1,270.0	386	.259	328.9	355	1,167.6
1978	———	409				———
Subtotal	7,971.0					8,439.9
EPC's 20% Share	1,594.2					1,688.0
Capitalized Interest	241.7				Interest	189.0
Total Original Cost	1,835.9				Total CRN	1,877.0

(1) Excluding land ($3.0 M) and right of way ($1.0 M)

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT III

[LETTERHEAD OF EXXON PIPELINE COMPANY]

April 27, 1977

Re: ACA/RJL

Mr. John A. Grady, Director
Bureau of Accounts
Interstate Commerce Commission
Washington, D. C. 20423

As requested in Mr. Ronald Young's letter of January 4, 1977, we are submitting our views on the Trans Alaska Pipeline System (TAPS) service life and estimated cost as of December 31, 1977. These details are shown on Attachments I and II.

In response to your other questions, we offer the following information:

1. Known recoverable reserves from the Prudhoe Bay Field (Sadlerochit Reservoir) are estimated at 9.6 billion barrels, including condensates and gas liquids, as reported in Appendix B, page 83, of the latest edition of the API-AGA publication, "Reserves of Crude Oil, Natural Gas Liquids and Natural Gas in the U.S. and Canada", dated December 31, 1975. Although other commercial reserves could be discovered or developed in the area tributary to TAPS some time in the future, such discoveries are speculative and cannot now be classified as known recoverable reserves for this purpose. TAPS service life should be based on presently known recoverable reserves and adjusted if and when additional or new reserves are discovered and proven in the area tributary to TAPS.

Verified Statement of E. Terry, Exxon Pipeline.

2. The anticipated annual throughput, based on Prudhoe Bay Field reserves, is shown on Attachement III. Use of the Mortada estimate as indicated on the table should not be construed to imply agreement with other elements of the study.

3. We understand that you define the minimum annual economic throughput level as being the level at which cash inflow from tariff charges will be equal to cash needed to cover out-of-pocket expenses. Since this information is to be used by the ICC to determine service life for depreciation, we submit that the minimum economic throughput level thus defined is not relevant. Instead, the facilities should be depreciated over a period during which the Owner can expect to earn a fair return based upon ICC valuation, giving proper consideration to the high level of risk inherent in the construction and operation of TAPS under the facts and circumstances. We estimate that a fair rate of return can no longer be earned when throughput declines to a level of 200-300 HBPD.

We would like to emphasize that estimating this throughput level for TAPS is extremely difficult and to a large degree is arbitrary because it depends upon estimating several factors for a period many years in the future such as a) the level of pipeline operating and maintenance costs and expenses in a totally new and radically difficult environment for a pipeline that is subject to rigorous government specifications and oversight, b) the impact of inflation on such costs and expenses, and c) the maximum tariff rates that the ICC will approve and shippers will be able to pay considering producers' operating expenses and prices being paid or permitted for crude oil in the fields connected.

Verified Statement of E. Terry, Exxon Pipeline.

4. Based on the throughput profile shown on Attachment III and the position stated in the answer to question 3, we estimate the economic ownership life of the TAPS system at no more than 25 years. At the end of that time, throughput is expected to be down to 240,000 barrels per day and declining. At or below that throughput level, it is likely that shippers would not be able to pay the tariff rates required to keep the pipeline in operation were the depreciation charges still a major factor of costs.

As you know, the U.S. pipeline industry has no experience in operating a pipeline of the design and in an environment similar to that existing for TAPS. Under these conditions, maintenance problems and costs are extremely difficult to predict, and we think the costs of prolonging the life of the pipeline in excess of 25 years might be prohibitive at such low throughput levels.

5. Provisions in the Federal and State right of way permits require that the Owners of TAPS, upon completion of the use of all or a very substantial part of the right of way, remove the improvements and equipment installed thereon and restore the environment to an approved condition. While this cost is not epected to be expended until about the year 2002, it is a constractual commitment of the Owners that was essential to TAPS' construction. Accordingly, it must be recognized as a cost of operating the System.

Since this cost is expected to exceed any net salvage credits accruing to the project, we propose that the cost of dismantling and environmental restoration be accounted for separately from depreciation in order to preclude negative net plant investment balances later in the life of TAPS. Accordingly, zero salvage should be assumed for depreciation purposes.

Alyeska is currently making a study of TAPS abandonment, salvage and environmental restoration costs. This

Verified Statement of E. Terry, Exxon Pipeline.

information should be available about May 1, 1977, and will be provided as soon thereafter as possible.

6. We understand that the ICC is currently considering the unit of production (throughput) method as a possible alternative to straight-line depreciation for TAPS. Considering the probable throughput buildup and decline for this system, as shown in Attachment III, we have no objection to the application of the unit of production method for TAPS. The unit of production method would more closely match depreciation expense with the revenues generated by line throughput and thus minimize the extent to which tariffs would have to be adjusted from time to time. To be consistent, the unit of production method would also be used to accrue the reserve for dismantling, abandonment, and environmental restoration. Should additional recoverable oil reserves be developed that are tributary to and delivered into TAPS, the unit of production basis would be adjusted accordingly.

Several of the TAPS owner-company representatives will be in Washington on May 2 and May 3 and will be available to discuss the above matters with you and Mr. Young at your convenience.

J. D. STURTEVANT

JDS:hm
Attachments
bcc + atts.: Messrs. G. E. Uthlaut
R. R. Die
F. L. Heard, Jr.
H. P. Luckett
M. J. Brady
E. C. Buettner
F. M. Fleming
A. O. Hinkle (3)

Interstate Commerce Commission – Depreciation Study
Trans Alaska Pipeline System – Estimated Cost as of 12-31-7
(Millions of Dollars)

NAME OF CARRIER
EXXON PIPELINE COMPANY.

ATTACHMENT I

Primary Account No.	PRIMARY ACCOUNT TITLE	12-31-77 Book Cost (Estimated as of 4-25-77)	Estimated Net Salvage (%) (Col. 3 Sch. 2 divided by Col. 1)	Service Value (%) (100% Minus % (Col. 2))	Weighted Avg. Yr. Installed (Col. 8 Sch. 2)	Weighted Avg. Estimated Yr. of Retirement (Col. 7 Sch. 2 by Col. 1)	Weighted Avg. Whole Life (Col. 5 Minus Col. 4)	Annual Composite Rate (Col. 3 divided by Col. 6)	Actual Accrual (%) (Col. 1 times Col. 7)
		(1)	(2)	(3)	(4)	(5)	(6)	(7)*	(8)
		E.P.C.'s 20%							
182	Right of Way	.2	-0-	100%	1977	2002	25 yrs.	4.0%	-
183	Line Pipe	28.2	-0-	100%	1977	2002	25 yrs.	4.0%	1.1
184	Line Pipe Fittings	7.6	-0-	100%	1977	2002	25 yrs.	4.0%	.3
185	Pipelines Construction	1108.6	-0-	100%	1977	2002	25 yrs.	4.0%	44.3
186	Buildings	45.8	-0-	100%	1977	2002	25 yrs.	4.0%	1.8
187	Valves	2.4	-0-	100%	1977	2002	25 yrs.	4.0%	.1
188	Pumping Equipment	15.4	-0-	100%	1977	2002	25 yrs.	4.0%	.6
189	Working Tools and Machinery	-	-	-	-	-	-	-	-
190	Other Station Equipment	102.0	-0-	100%	1977	2002	25 yrs.	4.0%	4.1
191	Oil Tanks	9.2	-0-	100%	1977	2002	25 yrs.	4.0%	.4
192	Delivery Facilities	264.2	-0-	100%	1977	2002	25 yrs.	4.0%	10.6
193	Communication Systems	.6	-0-	100%	1977	1987	10 yrs.	10.0%**	.1
194	Office Furniture and Equipment	.2	-0-	100%	1977	2002	25 yrs.	4.0%	-
195	Vehicles and Other Work Equipment	10.0	-0-	100%	1977	1980-85	3-8 yrs.	13.2%** Composite	1.3
	E.P.C. Capitalized Interest (This will be allocated to above accounts at later date.)	241.7	-0-	100%	1977	2002	25 yrs.	4.0%	9.7
	TOTAL	1836.1							74.6

* NOTE 1: If unit of production (throughput) method is used, the composite depreciation rate in this colum would be approximately $1.00 per bbl. using the projected production volume) shown on Attachment III.

** NOTE 2: Some shorter life for accounts 193 and 195 expected in final analysis. EPC's present rates used for illustrative purposes only

OF THE TRANS ALASKA PIPELINE SYSTEM AS OF DECEMBER 31, 1977
AS REPORTED BY ALYESKA PIPELINE SERVICE COMPANY
AS AGENT FOR CONSTRUCTION FOR OWNERS

ATTACHMENT II

(See footnotes which are a part of statement)

	Expenditures as of 12/31/76	Expenditures Year 1977	Expenditures Year 1978	Expenditures Year 1979	Expenditures Year 1980	Expenditures Year 1981	Expenditures Year 1982	Expenditures Year 1983	Accumulated Expenditures as of 12/31/76	Estimated Expenditures Year 1977	Estimated Expenditures Year 12/31/
	Millions of Dollars										
ACCOUNT											
181 Land											
182 Right of way											
183 Line pipe											
184 Line pipe fittings											
185 Pipeline construction											
186 Buildings											
187 Valves											
188 Pumping equipment											
190 Other station equipment											
191 Oil tanks											
192 Delivery facilities											
193 Communication system											
194 Office furniture & equipment											
195 Vehicles & other work equipment											
TOTAL											

Footnotes:

1. This schedule reflects a tentative classification of the estimated construction costs of the Trans Alaska Pipeline System (TAPS). The costs included are those construction costs recorded by, or estimated accounts to be recorded by, Alyeska Pipeline Service Company as Construction Agent for the TAPS Owners and do not include capitalized interest and financing costs or other capitalized costs pertaining to an individual Owner which such Owner may have recorded in its book of accounts.

2. The TAPS facilities are jointly owned by the following companies, each of them own an undivided interest in the TAPS facilities in the percentage as indicated:

Amerada Hess Pipeline Corporation	1.50	Exxon Pipeline Company	20.00
ARCO Pipe Line Company	21.00	Mobil Alaska Pipeline Company	5.00
BP Pipelines Inc.	15.54	Phillips Petroleum Company	1.66
Exxon Pipeline Company	20.00	Sohio Pipe Line Company	31.78
		Union Alaska Pipeline Company	1.66

3. The estimated construction costs as of December 31, 1977, are the budget amounts approved by the Owners on April 25, 1977 and are for the completion of TAPS to an initial design capacity of 1.8 million barrels per day. These budget amounts do not include provisions for contingencies or unknown final engineering or construction changes or adjustments.

4. The Interstate Commerce Commission Uniform System of Accounts for Pipeline Companies provides that the cost of carrier property under construction is to be recorded in Account 107, Construction work in progress. When construction work is completed, the costs included in this account are to be transferred to the appropriate primary property accounts. The classification of estimated costs as reflected by this schedule is tentative and for information purposes only. Ultimate classification of actual expenditures into the appropriate primary property accounts may vary significantly from this presentation.

5. Alyeska Pipeline Service Company has received cost for projected TAPS construction costs in billion of dollars as follows:

Construction costs expended through March 1977	$7.6B
Projected net expenditures April 1977 to December 31, 1977	.6B
Total estimated construction costs	$8.2B

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT III

TAPS ANTICIPATED ANNUAL THROUGHPUT

	Million Barrels	MMBPD Equivalent
1977	72	0.60*
78	438	1.20
79	438	1.20
80	548	1.50
81	548	1.50
82	548	1.50
83	548	1.50
84	548	1.50
85	548	1.50
86	518	1.42
87	476	1.30
88	442	1.21
89	405	1.11
90	377	1.03
91	347	0.95
92	318	0.87
93	296	0.81
94	268	0.73
95	240	0.66
96	213	0.58
97	193	0.53
98	170	0.47
99	146	0.40
2000	126	0.35
01	105	0.29
02	88	0.24
	8,964	

* Average rate for last four months of 1977.

SOURCE: "The Determination of Equitable Pricing Levels for North Slope Alaskan Crude Oil" dated November 1976 (Mortada Study), Table VI-2, with minor adjustments for 1977 and 1979 throughput volumes to reflect our current estimates of dates of initial startup and completion of first expansion. The throughput estimates in excess of 1.2 MMBD shown above for the years 1980-1988 reflect the assumption that TAPS capacity will be expanded by 1980; however, there is no agreement among the TAPS Owners for such an expansion at this time.

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT IV

June 1, 1977

Mr. John A. Grady, Director
Bureau of Accounts
Interstate Commerce Commission
Washington, D.C. 20423

As requested in Mr. J. Richard Berman's letter of May 11, 1977, we are submitting Exxon Pipeline Company's projected operating expenses applicable to our 20% undivided interest ownership in the Trans Alaska Pipeline System for the calendar year 1978. Since the major portion of costs related to the start-up of TAPS will have been expended in 1977, the calendar year 1978 estimates represent costs for a more normal level of operations. These estimates are reflected in Attachment 1.

In response to Mr. Berman's other questions, we offer the following information:

1) Latest projections by Alyeska indicate that the first oil will be received into the Trans Alaska Pipeline System at Prudhoe Bay by July 1, 1977. The initial pipeline fill rate will be approximately 300,000 barrels per day, with deliveries into tankers at Valdez beginning in August 1977. It is expected that the throughput will increase gradually, reaching 1.2 million barrels per day, which is the design capacity of the present System, in September 1977.

2) Information concerning our assumptions as to the service life of TAPS, including a projected throughput profile, was contained in our letter dated April 27, 1977.

3) Alyeska has estimated the cost to remove the above ground TAPS facilities and restore the environment to an approved condition at $1.049 billion (in 1977 dollars),

Verified Statement of E. Terry, Exxon Pipeline.

EPC's 20% share of which is $210 Million. We believe that the ultimate cost of this effort to be incurred at the end of the life of TAPS, after allowing for inflation, should be provided for ratably over the life of TAPS and accounted for separately from the depreciation reserve. We plan to include an appropriate charge in our initial TAPS tariff and to account for this accrual using accounts 660 (debit) and 63 (credit).

4) The projected operating expenses for 1978 included in Attachment 1 represent Exxon Pipeline Company's 20% share of Alyeska's latest Operating Budget dated May 16, 1977. To these amounts we have added our own estimates of expenses to be incurred by Exxon Pipeline Company and allocable to our ownership in TAPS. Also included in the attachment are our estimated interest expenses for 1978.

5) Our assumptions regarding the throughput to be used in computing our initial TAPS tariff are not yet finalized.

6) Exxon Pipeline Company's estimate of Working Capital relating to TAPS to be included in EPC's valuation as of January 1, 1978 is $8 Million.

Original Signed

J. D. STURTEVANT

JDS/MJB/ems

Attachment
cc: Messrs. G. E. Uthlaut
R. R. Die
F. L. Heard, Jr.
R. H. Voripaieff

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT

EXXON PIPELINE COMPANY
ESTIMATED OPERATING EXPENSES
TRANS ALASKA PIPELINE SYSTEM
YEAR 1978
(Thousands of Dollars)

Account No.	Name	20% of Expenses Incurred By Alyeska On Behalf of Owners	Expenses Incurred By EPC	Total Estimated Expenses
	OPERATIONS			
300	Salaries and Wages	1,841.0	-	1,841.0
310	Supplies and Expenses	1,183.6	-	1,183.6
320	Outside Services	1,094.2	-	1,094.2
330	Operating Fuel and Power	5,705.6	4,500.0	10,205.6
340	Oil Losses and Shortages	-	-	-
	Total Operations	9,824.4	4,500.0	14,324.4
	MAINTENANCE			
400	Salaries and Wages	1,328.6	-	1,328.6
410	Supplies and Expenses	783.4	-	783.4
420	Outside Services	15,483.6	-	15,483.6
430	Maintenance Materials	1,732.2	-	1,732.2
	Total Maintenance	19,327.8	-	19,327.8
	GENERAL			
500	Salaries and Wages	3,579.4	395.0	3,974.4
510	Supplies and Expenses	1,351.6	50.0	1,401.6
520	Outside Services	4,860.6	140.0	5,000.6
530	Rentals	1,466.6	30.0	1,496.6
540	Depreciation and Amortization	-	73,700.0	73,700.0
550	Pensions and Benefits	1,231.6	110.0	1,341.6
560	Insurance	800.0	-	800.0
570	Casualty and Other Losses	-	-	-
580	Pipeline Taxes	456.6	31,900.0	32,356.6
	Total General	13,746.4	106,325.0	120,071.4
	OTHER			
650	Interest Expense	1,860.8	114,500.0	116,360.8
660	Provision for removal and restoration	-	16,400.0	16,400.0
	Total Other	1,860.8	130,900.0	132,760.8
	GRAND TOTAL	44,759.4	241,725.0	286,484.4

6/1/77

ATTACHMENT V

EXXON PIPELINE COMPANY'S TAPS TARIFF COMPUTATION - 1978

	M$ Amount
Revenue	572.0
Operating Expense	
Alyeska Field and Administrative	44.8
Topping Plant Fuel and Natural Gas	4.5
Exxon Pipeline Company Administrative	.7
Ad Valorem Taxes	31.9
Book Depreciation	73.7
TAPS Dismantling	16.4
Interest Expense	114.5
Taxable Income	285.5
Provision For Income Taxes	147.2
Earnings	138.3
Throughput - MB	87.60
ICC Valuation	1,976.5
Return on Valuation - %	7.5
Tariff Rate - $/bbl.	6.53

ATTACHMENT VI

EXXON PIPELINE COMPANY'S TAPS TARIFF COMPUTATION

	M$				
	1978	1979	1980	1981	1978-1981 Average
Revenue	572.0	567.4	563.2	571.5	568.7
Operating Expense					
Alyeska Field and Administrative	44.8	47.0	49.4	57.1	49.6
Topping Plant Fuel and Natural Gas	4.5	4.6	4.7	6.1	5.0
Exxon Pipeline Company Administrative	.7	.7	.8	.8	.8
Ad Valorem Taxes	31.9	31.9	31.9	32.8	32.1
Book Depreciation	73.7	73.7	73.7	75.8	74.2
TAPS Dismantling	16.4	16.4	16.4	16.4	16.4
Interest Expense	114.5	106.7	98.7	92.6	103.2
Taxable Income					287.4
Provision for Income Taxes					149.1
Earnings					138.3
Throughput - MB	87.60	87.60	87.60	100.22	90.75
ICC valuation					1,976.3
Return on Valuation - %					7.0
Tariff Rate - $/bbl.					6.27

Verified Statement of E. Terry, Exxon Pipeline.

ATTACHMENT VII

FORECAST OF EXXON PIPELINE COMPANY'S
TAPS EARNINGS FOR THE YEARS 1977 AND
1978 AT A RATE OF $6.27

	1977 M$ Amount	1978 M$ Amount
Revenue	206.6	521.8
Operating Expense	21.9	50.0
Ad Valorem Taxes	11.8	31.9
Bood Depreciation	30.7	73.7
TAPS Dismantling	6.8	16.4
Interest Expense	49.3	114.5
Taxable Income	86.1	235.3
Provision for Income Taxes	41.3	120.6
Earnings	44.8	114.7
Throughput - MB	32.9	83.2
ICC Valuation	1,976.5	1,976.5
Return on Valuation - %	5.4	5.8

Verified Statement of E. Terry, Exxon Pipeline.

VERIFICATION

STATE OF TEXAS }
COUNTY OF HARRIS }

ERNEST C. TERRY, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

ERNEST C. TERRY

Subscribed and sworn to
before me this 21st day
of June 1977.

DELLA HEURING,
Notary Public in and for
Harris County, Texas.

DELLA HEURING
My Commission Expires 10-31-78.

"Appendix B" to Memorandum of Exxon Pipeline Co. In Support of Application for Injunction: Letter of Chairman Stafford, ICC, To Rep. Hungate Enclosing Corrections To "Hungate Report" July 12, 1977.

LETTERHEAD OF INTERSTATE COMMERCE COMMISSION

March 22, 1976

Honorable William L. Hungate
Chairman
Subcommittee on Activities of
Regulatory Agencies
Committee on Small Business
House of Representatives
Washington, D.C. 20515

Dear Chairman Hungate:

By letter of November 10, 1975 to you, I answered certain questions contained in your letter of October 7, 1975. These answers provided supplemental information on several items covered in my testimony before the Subcommittee on October 2, 1975. The answer to question No. 5 provided figures on the average return on investment for companies owning oil pipelines for the last five years. Since that information was forwarded, it has been discovered that there is a discrepancy in the data for "Rate of Return on Valuation, Year-1972." This was caused by inadvertently picking up from the wrong year the net income (or loss) figure.

We have made the necessary corrections to the affected schedules, schedules I and IV, and I am enclosing copies of those corrected schedules. I request that these schedules be substituted for the corresponding schedules that are presently contained in the answer to question No. 5.

I regret this mistake, and I hope that we have discovered it in time to have it corrected on the record. Please let me know if I can assist you any further in this matter.

Sincerely yours,

GEORGE M. STAFFORD
Chairman

Enclosures

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE I

OIL PIPE LINE COMPANIES—RATES OF RETURN ON VALUATION
YEARS 1970 THRU 1973

FROM SUPPORTING SCHEDULES II THRU V

Name of Company	1970	1971	1972	1973
1. Acorn Pipeline Company	16.58	16.96	16.42	14.20
2. Allegheny Pipeline Company	5.72	5.38	3.89	4.72
3. American Petrofina Co. of Texas, Products Pipeline Dept.	6.62	—	—	—
4. Amoco Pipeline Company	7.61	7.75	7.24	6.77
5. Arapahoe Pipe Line Company	1.45	2.11	1.32	0.85
6. Arco Pipe Line Company	4.25	3.72	3.54	3.93
7. Ashland Pipe Line Company	4.96	6.70	6.93	5.12
8. Atlantic Pipe Line Company[1]	4.09	—	—	—
9. Badger Pipe Line Company	6.51	7.47	8.32	6.80
10. Belle Fourche Pipe Line Company	—	—	—	10.81
11. Black Lake Pipe Line Company	4.90	2.62	2.65	4.83
12. Buckeye Pipe Line Company	4.00	3.60	3.75	4.08
13. Butte Pipe Line Company	4.72	3.89	3.88	9.61
14. Calnev Pipe Line Company	11.63	13.05	11.61	8.89
15. Cherokee Pipe Line Company	4.12	3.44	3.18	1.27
16. Chevron Pipe Line Company	5.60	5.98	6.30	5.64
17. Cheyenne Pipe Line Company	7.15	—	7.08	7.52
18. Chicep Pipe Line Company	—	(1.15)	(1.17)	2.58
19. Cities Service Pipe Line Company	6.96	7.45	5.82	6.60
20. Collins Pipe Line Company	—	—	—	4.84
21. Colonial Pipe Line Company	5.00	4.07	3.62	3.94
22. Continental Pipe Line Company	5.05	6.29	7.69	7.45
23. Cook Inlet Pipe Line Company	6.89	8.69	9.87	8.49
24. CRA, Inc.	1.77	0.49	1.17	(1.11)
25. Crown Central Pipe Line and Transportation Company	21.11	(1.63)	(25.69)	(9.09)
26. Crown-Rancho Pipe Line Corp.	21.34	19.38	18.69	17.70
27. Diamond Shamrock Corp. Products Pipe Line Dept.	0.19	(1.93)	(0.43)	(0.85)
28. Dixie Pipeline Company	5.14	5.27	6.32	4.56
29. Emerald Pipe Line Corp.	3.80	4.34	5.68	6.82
30. Eureka Pipeline Company	2.57	1.70	4.16	(0.18)
31. Exxon Pipe Line Company[2]	6.85	5.55	6.20	6.35
32. Four Corners Pipe Line Company	2.38	1.93	1.43	0.40
33. Gulf Refining Company	3.85	3.12	4.05	4.27

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE I

OIL PIPE LINE COMPANIES—RATES OF RETURN ON VALUATION
YEARS 1970 THRU 1973

FROM SUPPORTING SCHEDULES II THRU V

Name of Company	1970	1971	1972	1973
34. Hess Pipe Line Company	3.30	2.95	(0.25)	1.68
35. Hydrocarbon Transportation, Inc.	1.86	1.01	2.75	3.21
36. Jayhawk Pipe Line Corporation	4.03	3.35	3.30	4.52
37. Jet Lines, Inc.	0.93	2.19	2.91	2.34
38. Kaneb Pipe Line Company	4.58	5.29	6.10	5.34
39. Kaw Pipe Line Company	3.01	4.77	3.59	2.88
40. Kenai Pipe Line Company	2.93	—	—	—
41. Kerr-McGee Pipeline Corp.	—	—	—	7.25
42. Lake Charles Pipe Line Company	5.33	4.29	6.63	5.63
43. Lakehead Pipe Line Co., Inc.	3.82	4.32	5.06	5.65
44. Laurel Pipe Line Company	2.68	1.80	0.71	2.05
45. Mapco, Inc.	2.98	3.68	4.01	2.61
46. Marathon Pipe Line Company	3.18	3.92	5.06	3.60
47. Michigan-Ohio Pipeline Corp.	2.81	1.60	0.59	1.14
48. Mid-Valley Pipeline Corp.	4.72	5.13	5.16	4.65
49. Minnesota Pipe Line Company	14.95	15.67	13.28	10.38
50. Mobil Pipe Line Company	3.92	4.00	3.44	3.33
51. National Transit Company	1.79	(0.69)	—	—
52. Ohio River Pipe Line Company	(4.23)	(3.55)	0.22	(3.40)
53. Okan Pipeline Company[3]	5.77	3.48	3.57	35.95
54. Olympic Pipe Line Company	4.59	5.00	3.52	3.30
55. OMR Pipe Line Company[4]	7.04	8.27	—	—
56. Paloma Pipe Line Company	11.22	16.98	13.93	12.25
57. Panotex Pipe Line Company	1.50	—	—	—
58. Phillips Petroleum Company Products Pipe Line Dept.	9.01	7.02	8.31	8.87
59. Phillips Pipe Line Company	6.20	—	5.91	5.08
60. Pioneer Pipe Line Company	8.00	8.35	9.87	9.11
61. Plantation Pipe Line Company	3.57	4.24	2.65	3.08
62. Platte Pipe Line Company	5.95	5.24	5.30	6.44
63. Portal Pipe Line Company	2.98	3.73	3.74	3.82
64. Portland Pipe Line Corp.	4.69	4.15	4.07	3.79
65. Pure Transportation Company	5.93	7.47	7.53	6.49
66. Shamrock Pipe Line Corp.	4.35	3.71	3.08	3.96
67. Shell Pipe Line Corp.	5.71	5.84	5.39	4.74

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE I

OIL PIPE LINE COMPANIES—RATES OF RETURN ON VALUATION
YEARS 1970 THRU 1973

FROM SUPPORTING SCHEDULES II THRU V

Name of Company	1970	1971	1972	1973
68. Skelly Pipe Line Company	2.38	5.24	4.82	(3.53)
69. Sohio Pipe Line Company	2.62	3.75	3.79	5.29
70. Southcap Pipe Line Company	0.45	4.11	4.01	5.22
71. Southern Pacific Pipe Line, Inc.	8.24	8.62	8.40	9.10
72. Sun Oil Line Co. of Michigan	—	2.65	9.04	4.26
73. Sun Pipe Line Company	4.69	7.07	6.29	5.35
74. Tecumseh Pipe Line Company	1.41	1.29	2.74	6.71
75. Texaco-Cities Service Pipe Line Company	2.23	1.94	1.48	0.46
76. Texas Eastern Transmission Co.	4.33	—	4.15	—
77. Texas Pipe Line Company	5.86	5.76	6.08	4.38
78. Texas-New Mexico Pipe Line Co.	5.74	4.88	5.14	5.22
79. Trans-Mountain Oil Pipe Line Corp.[5]	17.73	17.49	21.53	20.46
80. Trans-Ohio Pipeline Company	1.17	2.59	11.26	14.43
81. UCAR Pipeline Inc.	—	—	—	(1.80)
82. Wabash Pipe Line Company[6]	0.91	1.76	1.67	—
83. West Emerald Pipe Line Corp.	6.29	5.87	3.28	3.00
84. West Shore Pipe Line Company	7.19	7.48	6.10	4.16
85. West Texas Gulf Pipe Line Company	5.98	5.80	6.54	6.06
86. White Shoal Pipeline Corp.	16.20	11.96	12.43	15.45
87. Williams Pipe Line Company	3.36	3.08	3.41	3.61
88. Wolverine Pipe Line Company	0.51	1.95	0.36	0.77
89. Wyco Pipe Line Company	3.91	5.75	7.19	6.35
90. Yellowstone Pipe Line Company	6.44	7.85	6.74	6.11
Average—All Companies	4.73	4.71	4.69	4.68

1. Merged with Arco Pipe Line Company in 1971.
2. Name changed from Humble Pipe Line Company.
3. Major portion of carrier's properties sold to Okie Pipe Line Company in 1973. Net income reflects income from properties not included in valuation rate base determined by the Commission as of 12-31-73.
4. Merged with Sun Pipe Line Company in 1972.
5. Carrier is controlled by Trans Mountain Pipe Line Company, a Canadian corporation, through ownership of all the outstanding capital stock.
6. Merged with Marathon Pipe Line Company as of close of business 12-31-72.

NOTE—1974 Valuation Reports were not available to calculate a rate of return.

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE IV

OIL PIPE LINE COMPANIES—RATE OF RETURN ON VALUATION
YEAR—1972

(000 omitted)

Name of Company	Valuation of Carrier Property[1]	Net Income (or Loss)[2]	Rate of Return on Valuation (Col. 3 ÷ Col. 2)
(1)	(2)	(3)	(4)
1. Acorn Pipeline Company	$ 2,466	$ 405	16.42
2. Allegheny Pipeline Company	10,801	420	3.89
3. Amoco Pipe Line Company	214,193	15,509	7.24
4. Arapahoe Pipe Line Company	22,250	293	1.32
5. Arco Pipe Line Company	166,359	5,896	3.54
6. Ashland Pipe Line Company	57,886	4,010	6.93
7. Badger Pipe Line Company	13,410	1,116	8.32
8. Black Lake Pipe Line Company	9,307	247	2.65
9. Buckeye Pipe Line Company	162,718	6,106	3.75
10. Butte Pipe Line Company	15,650	607	3.88
11. Calnev Pipe Line Company	13,848	1,608	11.61
12. Cherokee Pipe Line Company	28,039	892	3.18
13. Chevron Pipe Line Company	90,901	5,726	6.30
14. Cheyenne Pipe Line Company	3,544	251	7.08
15. Chicap Pipe Line Company	24,976	(292)	(1.17)
16. Cities Service Pipe Line Company	24,999	1,455	5.82
17. Colonial Pipeline Company	480,458	17,416	3.62
18. Continental Pipeline Company	66,861	5,139	7.69
19. Cook Inlet Pipe Line Company	36,108	3,563	9.87
20. CRA, Inc.	4,881	57	1.17
21. Crown Central Pipe Line and Transportation Company	109	(23)	(25.69)
22. Crown-Rancho Pipe Line Corp.	1,525	285	18.69
23. Diamond Shamrock Corporation	19,048	(81)	(0.43)
24. Dixie Pipeline Company	48,637	3,075	6.32
25. Emerald Pipe Line Corporation	1,056	60	5.68
26. Eureka Pipeline Company	6,246	(260)	(4.16)
27. Exxon Pipe Line Company	238,670	14,804	6.20
28. Four Corners Pipe Line Company	32,489	464	1.43
29. Gulf Refining Company	135,754	5,496	4.05
30. Hess Pipe Line Company	20,433	(52)	(.25)
31. Hydrocarbon Transportation, Inc.	74,831	2,057	2.75

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE IV

OIL PIPE LINE COMPANIES—RATE OF RETURN ON VALUATION
YEAR—1972

(000 omitted)

Name of Company	Valuation of Carrier Property[1]	Net Income (or Loss)[2]	Rate of Return on Valuation (Col. 3 ÷ Col. 2)
(1)	(2)	(3)	(4)
32. Jayhawk Pipe Line Corporation	13,118	433	3.30
33. Jet Lines, Inc.	4,153	121	2.91
34. Kaneb Pipe Line Company	31,369	1,915	6.10
35. Kaw Pipe Line Company	5,048	181	3.59
36. Lake Charles Pipe Line Company	4,011	266	6.63
37. Lakehead Pipe Line Co., Inc.	297,709	15,055	5.06
38. Laurel Pipe Line Company	37,687	268	0.71
39. Mapco, Inc.	124,601	4,994	4.01
40. Marathon Pipe Line Company	83,637	4,234	5.06
41. Michigan-Ohio Pipeline Corp.	5,746	34	0.59
42. Mid-Valley Pipeline Corp.	62,587	3,227	5.16
43. Minnesota Pipe Line Company	16,342	2,170	13.28
44. Mobil Pipe Line Company	200,709	6,910	3.44
45. Ohio River Pipe Line Company	1,844	4	0.22
46. Okan Pipeline Company	5,018	179	3.57
47. Olympic Pipe Line Company	32,799	1,154	3.52
48. Paloma Pipe Line Company	5,542	772	13.93
49. Phillips Petroleum Company	11,322	941	8.31
50. Phillips Pipe Line Company	102,636	6,067	5.91
51. Pioneer Pipe Line Company	6,293	621	9.87
52. Plantation Pipe Line Company	214,799	5,683	2.65
53. Platte Pipe Line Company	52,091	2,760	5.30
54. Portal Pipe Line Company	16,366	612	3.74
55. Portland Pipe Line Corporation	43,133	1,756	4.07
56. Pure Transportation Company	40,504	3,050	7.53
57. Shamrock Pipe Line Corporation	10,328	318	3.08
58. Shell Pipe Line Corporation	153,480	8,279	5.39
59. Skelly Pipe Line Company	7,036	339	4.82
60. Sohio Pipe Line Company	35,658	1,353	3.79
61. Southcap Pipe Line Company	27,197	1,091	4.01
62. Southern Pacific Pipe Lines, Inc.	102,047	8,577	8.40
63. Sun Oil Line Company of Michigan	188	17	9.04

Letter of ICC Chairman to Congressman Hungate.

SCHEDULE IV

OIL PIPE LINE COMPANIES—RATE OF RETURN ON VALUATION YEAR—1972

(000 omitted)

	Name of Company	Valuation of Carrier Property[1]	Net Income (or Loss)[2]	Rate of Return on Valuation (Col. 3 ÷ Col. 2)
	(1)	(2)	(3)	(4)
64.	Sun Pipe Line Company	70,287	4,418	6.29
65.	Tecumseh Pipe Line Company	10,595	290	2.74
66.	Texaco-Cities Service Pipe Line Company	38,001	562	1.48
67.	Texas Pipe Line Company	156,857	6,515	4.15
68.	Texas Eastern Transmission Co.	105,309	6,400	6.08
69.	Texas-New Mexico Pipe Line Co.	53,201	2,733	5.14
70.	Trans Mountain Oil Pipe Line Corp.	3,748	807	21.53
71.	Trans-Ohio Pipeline Company	870	98	11.26
72.	Wabash Pipe Line Company	16,675	278	1.67
73.	West Emerald Pipe Line Corp.	1,200	40	3.28
74.	West Shore Pipe Line Company	16,057	979	6.10
75.	West Texas Gulf Pipe Line Co.	34,106	2,231	6.54
76.	White Shoal Pipeline Corp.	2,526	314	12.43
77.	Williams Brothers Pipe Line Co.	229,389	7,828	3.41
78.	Wolverine Pipe Line Company	38,285	138	0.36
79.	Wyco Pipe Line Company	18,051	1,297	7.19

"Appendix A" to Memorandum of Exxon Pipeline Co. In Support of Application for Injunction: Excerpts from Verified Statement of Raymond B. Gary of Morgan Stanley & Co. Inc. on Pipeline Rates of Return in ICC Docket Ex Parte 308, July 12, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATEMENT OF RAYMOND B. GARY
OF MORGAN STANLEY & CO. INCORPORATED

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CAPITAL STRUCTURE OF OIL PIPELINES

Most oil pipelines are highly leveraged, with debt, in the case of new systems, representing initially as much as 90% of total capitalization. Such debt ratios decrease, however, over the life of the particular pipeline. The high degree of leverage exhibited by pipeline companies is a direct outgrowth of the Elkins Act Pipeline Consent Decree entered into in 1941, which limited dividends on pipelines (owned by companies subject to the Consent Decree) to 7% of the ICC valuation of common carrier property owned and used in the business. The 7% figure established in 1941 is, however, unrealistic in terms of financial conditions prevailing today and has led to the financial patterns which have since evolved. In order to maximize returns on total capital within the absolute limit on permissible payouts, pipeline companies were forced to adopt the policy of financing new investments by debt to the greatest extent possible. In essence, the initial debt ratios of pipeline companies are artificially high, and on a stand-alone basis (i.e., without shipper-owner guarantee of debt) would be much lower.

Shipper-owner support of pipelines has enabled pipeline companies to place large amounts of debt, both as to dollar amount and ratio of debt to equity, with private and public

investors at interest costs which reflect the financial strength of the shipper-owners. In contrast, a representative sample of industrial companies indicates a debt ratio (long-term debt as a percent of capitalization) of about 20% for Aaa/AAA (highest grade) companies and a debt ratio of about 43% for Baa/BBB (medium grade) rated companies. Attachment II shows the averages of significant financial statistics for the sample of industrial companies classified by rating levels.

Attachment III sets forth Moody's and Standard & Poor's debt ratings of the 29 petroleum companies covered by The Chase Manhattan Bank's Energy Economics Division's annual *Financial Analysis of a Group of Petroleum Companies* (the "Chase Study"). In my judgment, were this group of companies rated on a composite and weighted basis, the appropriate rating would be Aa/AA. This is the second highest credit rating ("high grade") and is indicative of the advantages shipper-owner support brings to pipeline companies. Attachment III, page 2 sets forth the long-term debt ratios in the years 1971-1975 for the 29 companies in the Chase Study, and shows that it averaged between 21% and 24% in that period.

In the case of oil pipelines, however, debt ratios are higher because of the use of the borrowing capacity of shipper-owners. It must be recognized that lenders are willing to commit funds to the debt securities of oil pipeline companies having such a high degree of leverage *only* because of shipper-owner support, be it direct or indirect (through completion, throughput and cash deficiency agreements). But, as noted above, such shipper-owner support, even if indirect, is in essence an additional equity investment of the parent company. Were support from financially strong shipper-owners not available, lenders would

not permit such a high degree of leverage in oil pipelines even if the relative risk characteristics of the pipeline in question were at the low end of the risk spectrum. Indeed, prior to the existence of the Consent Decree, the average of oil pipeline debt ratios was below 20%. (See Attachment IV for debt ratios of the oil pipeline industry during the 1935-1939 period.)

Because the Consent Decree has resulted in a high degree of leverage in the pipeline industry, each shipper-owner is using up a portion of its available borrowing capacity in support of the pipelines. Not only is the shipper-owner using up its borrowing capacity, which could otherwise have been used elsewhere, but it is also assuming *both* the credit and the business risks of the pipeline. This is a commitment of capital to the total cost of the pipeline, equivalent in substance to a direct equity investment. Consequently, in order to maintain its debt ratio at a level which preserves its financial integrity, the shipper-owner may be forced either to forego other investments or to sell additional equity.

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"Appendix D" to Memorandum of Exxon Pipeline Co. In Support of Application for Injunction: Excerpts from Verified Statement of Ezra Solomon, Stanford University on pipeline rates of return in ICC Docket Ex Parte 308, July 12, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATEMENT OF EZRA SOLOMON

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DETERMINING THE RRR FOR OIL PIPELINE

As is true for all long-lived assets, the RRR for petroleum pipelines is equal to the sum of two factors:

(a) The level of the long-term rate of interest, e.g., the Aaa corporate bond rate; and

(b) An allowance for the required risk premium, *i.e.*, the differential risk involved in committing funds to owning and operating pipeline assets *relative* to the risk involved in owning a portfolio of Aaa corporate bonds.

Both factors have changed since 1940, and as a consequence the appropriate RRR for petroleum pipelines has also changed. There are two alternative ways in which the task of resetting those rates can be approached:

(1) We can begin with the 1940-41 decisions and update them to reflect changes which have occurred since those decisions were made.

(2) We can begin afresh and attempt to estimate the risk premium appropriate for pipelines in the light of evidence from the capital markets and what modern capital market theory tells us about these markets. In what follows, both approaches are addressed.

Verified Statement of Ezra Solomon, Stanford University.

UPDATING THE 1940-1941 DECISIONS

In 1941, the average yield to maturity offered by long-term Aaa corporate bonds (as compiled by Moody's) was 2.77 percent. The five year average for the period 1937-41 was somewhat higher, at 3.01 percent. (See Schedule 1 of Appendix A to this statement.) Thus the Commission's decision that 8 percent was an appropriate rate for oil pipelines implies an estimated basic risk premium of 5 percentage points. More risky pipelines (defined at that time as those transporting petroleum products) were allowed an extra 2 percentage point premium over and above the basic 5 percent.

However, circumstances have changed since the Commission made its judgments 35 years ago. In particular:

(1) All observable capital market rates have risen dramatically.

(2) Factors influencing the size of the risk premium on pipeline assets *relative* to high grade corporate bonds have also been changing.

In reviewing the RRR on pipelines in today's context, both elements must be taken into account.

The Rise in Interest Rates

The largest and most obvious change since 1940-41 is that basic interest rates are far higher today. As Schedule 1 of Appendix A shows, the Aaa corporate bond rate was 8.43 percent in 1976, a rise of 5.66 points since 1941 and of 5.09 points from the five year average rate of 1937-41. All other long-term interest rates, including U.S. government bonds, utility bonds, and lower grade corporate bonds, have also risen commensurately (5 or more percentage points) between 1941 and 1976.

In itself, the 5-5½ percentage point increase in basic interest rates would change the RRR on oil pipelines to an equal extent, *i.e.*, the 8 percent rate on oil pipeline should now be adjusted to 13-13½ percent.

The Crude vs. Product Differential

The 1940-41 decisions distinguished between crude oil lines (which were allowed a rate of return about 5 percentage points above the Aaa bond yield) and product lines (which were allowed an extra 2 percentage points above the crude oil pipeline rate). The crude oil lines were then perceived as having lower risk characteristics as compared to product lines. While pipelines today do vary with respect to risk, that original distinction is no longer a valid one. The basic RRR of 13-13½ percent should apply to all minimum risk lines, with the rate for riskier lines scaled upward appropriately to reflect their own particular additional risks, however caused. In terms of risk premium, the RRR on assets of the minimum risk lines should reflect a 5 percentage point risk premium over and above the Aaa corporate bond yield, and the RRR for riskier lines should reflect a correspondingly higher premium.

The Relative Risk of Pipeline Assets vs. Bonds

There are several reasons why investment in the assets of oil pipelines is riskier than investment in a portfolio of high grade corporate bonds.

(1) Bonds offer a highly predictable flow of contractually fixed interest and a date certain for repayment of principal. For Aaa bonds the prospect of default on contractual payments of interest and principal are both extremely low. If default does occur, the bond holders have recourse to properties which have a value which exceeds the amounts due to bond holders by a wide margin.

In contrast, an investment in pipeline assets is subject to far higher uncertainties. There is no contractual commitment that such assets will generate the flow of revenues or benefits originally expected from them. Unexpected declines can and do occur in crude production in the fields served by a pipeline; unexpected changes may also occur in the origin-destination patterns of oil flows; environmental as well as market factors can affect both revenues and costs in adverse ways; future changes in technology and the consequent development or entry of competitive lines or modes can also affect revenues.

(2) Bonds are highly liquid assets. They can be sold or exchanged prior to maturity if the investor chooses to do so. In contrast, a pipeline is a highly specific asset which has less liquidity than almost any asset to be found in society; it is an almost totally inflexible investment in a fixed route, dependent upon continuation of the supply-demand patterns prevailing at the time the line was built. About the only choice available should circumstances turn adverse is for the investor to abandon his assets.

However, there is one dimension of risk for which pipeline assets are less risky than long term bonds, and this is the risk of inflation. As prices rise, bondholders suffer a corresponding decline in the purchasing power of the interest and principal they receive. In short, bondholders have no protection against future inflation. In contrast, receipts from pipeline assets are *partially* protected against the ero-

sion from inflation by the fact that the Commission calculates their property rate base in a way which partially adjusts for inflation, *i.e.*, pipeline assets are valued as a weighted average of their original cost and their cost on an inflation-adjusted basis. Thus, if for example, the average weight given in the formula to the inflation-adjusted cost element is 60 percent over the life of a line, then the investor is protected against 60 percent of the erosion which inflation would otherwise produce in the purchasing power of his allowable return on assets.

The total risk of pipeline assets *relative* to that of high grade bonds is a joint result of all of the foregoing factors. Given the valuation basis used by the Commission, its 1940 judgment was that the proper differential between pipeline assets and high grade bonds was 5 percentage points. On some other valuation basis, that finding would have been higher or lower than 5 percent. Had an original cost rate base been used, the risk premium allowed would have to be higher than 5 percent.

Changes in Relative Risk Since 1941

Has the risk of constructing, owning and operating pipelines changed *relative* to the risk of holding Aaa corporate bonds? Obviously there is no easy answer to this question.

An analysis of the probable *change in relative risk* between 1941 and 1977 contains two elements: (a) an increase (or decrease) in the level of business risk in the pipeline industry (relative to bonds); (b) an increase (or decrease) in the purchasing power risk associated with bond ownership (relative to pipelines).

As far as the first component is concerned, the evidence outlined below suggests that the relative business risk of pipelines is higher today than it was in 1941.

(1) One major business risk for a crude pipeline is that it may lose its source of supply before capital invested in the line has been recouped, *i.e.*, that its economic life might turn out to be shorter than its planned life. This element of uncertainty has clearly increased since 1941 because rising domestic production capability has given way to declining domestic production capability with threats of sharper declines in the future. With rapidly changing patterns of energy supply and distribution, competition from modes servicing alternative sources has increased correspondingly, thus increasing uncertainty.

(2) Uncertainty has also increased because of this nation's increasing reliance on foreign sources of oil, which are subject to curtailment or interruption because of factors beyond our control.

(3) The location of pipelines has been shifting to more difficult terrain. As a result, all of the risks associated with construction and operation are larger on average in 1977 than they were in 1941.

(4) The recent emphasis on absolute environmental safety which did not exist in 1941 has added to the uncertainties both of construction and operation in 1977.

(5) There has been a huge jump in the scale and cost of investments in pipeline projects. When the size of each new investment commitment rises relative to the size of total past commitments, the degree of exposure to risk rises. For example, the perceived risk of placing 1 percent of one's wealth on any particular bet is far smaller than the perceived

risk of placing 100 percent of one's wealth on an identical bet.

Because of the joint effect of all of the factors just enumerated, the differential level of pipeline risk (relative to bond risk) is higher today than it was in 1941.

At the same time, the size of the differential purchasing power risk caused by the fact that inflation hurts bonds more than pipelines has also changed.

Between 1941 and 1961, the U.S. Consumer Price Index rose at a compound annual rate of 3.6 percent per annum. Thus bond holders who purchased a 20-year Aaa corporate bond in 1941 suffered an erosion of 3.6 percent a year in the purchasing power of the stream of proceeds they received from that bond. In contrast, pipelines were partially protected against such an erosion by the fact that the Commission calculates the property rate base for pipelines on a fair value basis. This allows some offset for inflation, since reproduction cost new is weighted into the valuation along with original cost. Let us assume the offset provided by the ICC's valuation methodology was 60 percent on average. In this case, bond holders in 1941 who held bonds till maturity suffered a *purchasing power risk* of 2.16 percent (60 percent of 3.6 percent) a year over the erosion which pipeline owners suffered.

It is not possible to say for certain whether this particular risk is higher today because we do not know for certain what the inflation rate is going to be between 1977 and 1997.

Will it be higher than 3.6 percent a year compounded? If so, the purchasing power risk of the bond holder in 1977 relative to the pipeline owner in 1977 will be higher than it was in 1941. Will the future inflation rate turn out to be lower than 3.6 percent a year compounded? If so, the purchasing power risk of the bond holder in 1977 relative to the pipeline owner in 1977 will be lower than it was in 1941. The fact is that we do not know and cannot know. All we can do is exercise human judgment.

Taking all factors into account, the question of whether the total differential risk of pipeline ownership *relative* to Aaa bond ownershp has changed since 1941 must be answered in the negative: there is no powerful evidence that *on balance* it has gone up a little or down a little.

As a consequence, the tentative results outlined earlier represent as good an estimate as financial theory allows. The proper RRR on valuation for minimum risk pipelines today would be 5 percentage points above the Aaa bond rate, *i.e.*, between 13 and 13½ percent.

EVALUATING THE 5 PERCENT RISK PREMIUM

Can the validity of a 5 percent risk premium for pipeline assets relative to Aaa bonds be evaluated independently? It can. The well-documented evidence now available on risk premiums required by the capital market on equities relative to high grade bonds provides a useful basis for doing so.

Two major studies have been published recently which measure the historic rates of return achieved on portfolios of common stock relative to that achieved on portfolios of high grade bonds. Since stocks and bonds are traded in a single and highly competitive capital market, and since investors are free to adjust equity and bond prices, it can be assumed that the average observed differential (measured over many economic cycles) between the yields on stocks and bonds properly represents the average differential which a rational market requires on equities relative to bonds.

The first study (referred to hereafter as the *Friend* study) is by Professors Irwin Friend and Marshall Blume. It is entitled "The Demand for Risky Assets" and was published in the *American Economic Review,* December 1975. It provides measures of the average yield which investors achieved on (1) a portfolio of high grade bonds and (2) a portfolio of common stocks (defined as all stocks listed on the New York Stock Exchange) for the seventy-year period 1902-1971.

The second study (hereafter referred to as the *Ibbotson* study) is by Professors Roger Ibbotson and Rex Sinquefield. It is entitled "Stocks, Bonds, Bills and Inflation: Year-by-Year Historical Returns 1926-74" and was published in the *Journal of Business,* January 1976. It provides measures of yields achieved by investors on (1) a portfolio of high grade bonds and (2) a portfolio of common stocks (defined as all stocks in the Standard and Poor's 500 stock index) for the period 1926-1974.

The results of both studies for various long run periods are shown in Schedule 2 of Appendix A to this statement. As Schedule 2 shows, the average differential yield required by the market on a portfolio of stocks relative to that on a portfolio of high grade bonds is about 7½ percent per annum.

There is little reason to believe that this 7½ percent historic differential between the rate required on equities and the rate required on high grade bonds has changed. While the *absolute* rates which the market requires on bonds and on equities changes over time because of inflation and other perceived risks, the same set of expectations are built into both rates. Thus both classes of securities may now be riskier than they used to be because of inflationary, political or fiscal expectations, but it is reasonable to assume that the *difference* in risk between the two is essentially unchanged; hence that the historic differential is also unchanged.

Since the rate now required on a portfolio of Aaa bonds is known, we can infer the rate of return required by the market on a portfolio of equities. In 1976 the average market yield on Aaa corporate bonds was 8.42 percent, and in early 1977 it varied between 8 and 8½ percent. Hence the corresponding yield expected on a portfolio of equities today lies between 15½ and 16 percent.

We can use this information in two ways in order to evaluate the judgment that the risk premium on minimum risk pipeline assets relative to a portfolio of bonds now runs about 5 percentage points.

(1) The first, and in my opinion, the superior method, would be to translate the 15½ to 16 percent return required by the market on the portfolio of corporate equities into the corresponding rate on a portfolio of corporate operating assets. The latter number could then be used as a basis for evaluating the appropriate rate of return on pipeline assets.

(2) The second method, which has been widely used in traditional utility regulation, would be to use the 15½ to 16 percent return required on the portfolio of corporate equities to estimate the rate required on the equity invested in pipeline assets. The latter number would then be used to calculate the rate required on pipeline assets.

Method A:

The 15½ to 16 percent return required on the portfolio of corporate equities reflects the operating and market risks

of the underlying assets *plus* the additional financial risk caused by the fact that corporations use long-term debt to finance their investment in assets. In order to translate the 15½ to 16 percent number into a required return on assets, it is necessary to adjust for the effects of financial leverage. The size of the adjustment depends on three factors, all of which can be readily estimated.

(1) The degree of leverage used, *i.e.*, the proportion of long-term debt to total long-term debt and equity. For the universe of non-financial corporations this ratio is around 25 percent.

(2) The rate required on debt financing. Because not all corporate bonds are Aaa rated, the appropriate figure to use is the average yield on corporate bonds. This was 9.01 percent in 1976.

(3) Because interest payments are tax deductible, the corporate tax rate is also relevant. A figure of 48 percent can be used for this purpose.

Combining these three facts, the 15½ to 16 percent rate on equities translates to a required rate on the portfolio of corporate assets of 12¾ to 13¼ percent. This provides a basis for evaluating the rate of 13 to 13½ percent on pipeline assets which we had previously derived. In my opinion, the portfolio of corporate assets is less risky than minimum risk pipelines. Thus, my 13 to 13½ percent figure is supported by the results of Method A.

Method B:

The second method is to use the 15½ to 16 percent equity rate to calculate the weighted average "required rates of return" on the debt and equity components of the capital by

which pipelines are financed. This is the standard method used in "utility regulation" as it is applied to natural gas pipelines, electric power utilities and telephone companies.

The problem in applying this method to oil pipelines is a threefold one:

(1) The figure of 15½ to 16 percent for all corporate equities reflects the 25 percent debt ratio used. It cannot be applied without adjustment to corporations which have a different debt ratio.

(2) Most pipelines are part of integrated oil companies. The required return of funds committed to pipeline construction, ownership and operation cannot be correctly calculated directly from company data.

(3) The ratio of debt to equity for individual pipelines is not an economically meaningfully figure. The reason for this is that many pipelines clearly use debt funds to an extent that could not be raised to acquire pipeline assets but for the fact that the parent company guarantees the pipeline's debt. That is, on a stand-alone basis pipeline properties could not sustain as high a debt ratio as might appear on their "books."

Thus, available objective evidence on debt ratios used by pipelines may not reflect a pipeline's own debt capacity. Exxon, to take a hypothetical example, could easily borrow $50 million of long-term funds for a particular venture at 8½ percent by pledging its corporate credit—but clearly that $50 million should not be committed to *any* particular risky venture which offers a yield of 8½ percent on the basis of that borrowing cost. Theory and evidence both tell

us that the RRR on a venture should reflect the riskiness of that venture—and not the "cost" of the funds which are apparently used in their financing.

For the reasons given, the standard "weighted cost-of-capital" approach for setting the required rate on pipelines is likely to be a misleading one unless great care is exercised. In order correctly to estimate the RRR on pipelines by this method, two types of adjustments are required:

(1) It is necessary to estimate the maximum debt ratio which the pipeline can in fact use if it had to be financed on its own: Such a judgment requires evidence based on the expertise of an investment banker. In any case, it is not likely to be the same debt ratio figure we would get by looking solely at the "books" of the "average" pipeline.

(2) It is necessary to adjust equity rates required per unit of equity and debt rates per unit of debt in order to allow for the additional risks to both induced by a debt ratio which is higher than the ratio (*i.e.*, 25 percent) found in the portfolio of corporate assets (*i.e.*, the Standard & Poor's index of 500 corporations) from which our estimates of required rates were originally derived.

CONCLUSION

Of all the methods explained, the simplest and probably the most correct one, is that which is based on an estimate of the *relative* risk of pipelines as compared to Aaa corporate bonds. This approach would stay with the original 5 percentage point premium, over and above the prevailing Aaa bond rate, found in the 1940-41 decisions. At today's Aaa bond rate the best answer is that pipeline assets, as valued by the Commission, require a rate of return in the 13 to 13½ percent range for pipelines of minimum risks—with the rate scaled upward for above average riskiness.

Appendix A
Schedule 1

Corporate Bond Yields, 1937-41 and 1972-76
(Percent per annum)

	Aaa bonds
1937	3.26
38	3.19
39	3.01
40	2.84
41	2.77
Average 1937-41	3.01
1972	7.21
73	7.44
74	8.57
75	8.83
76	8.43
Average 1972-76	8.10

SOURCE:

Moody's Investor Services and Economic Reports of the President, 1970 and 1976.

Verified Statement of Ezra Solomon, Stanford University.

Appendix A
Schedule 2

Arithmetic average of realized yields on stocks and bonds, and the differential yield between the two:
Various periods 1902-1974
(Percent per annum)

	Stocks	Bonds	Differential (Risk premium)
1902-71 (Friend)	10.7	4.0	6.7
1926-71 (Friend)	11.6	3.8	7.8
1926-71 (Ibbotson)	12.0	3.8	8.2
1926-74 (Ibbotson)	10.9	3.7	7.2
1946-74 (Ibbotson)	10.8	2.4	8.4
Average:	11.2	3.5	7.7

SOURCE:

Friend and Blume, "The Demand for Risky Assets," *American Economic Review*, December 1975, pp. 900-22; Ibbotson and Sinquefield, "Stocks, Bonds, Bills and Inflation: Year by Year Historical Returns 1926-1974," *Journal of Business*, January 1976, pp. 11-47.

Verified Statement of Ezra Solomon, Stanford University.

Appendix B

Qualifications of Dr. Ezra Solomon

I am Dean Witter Professor of Finance, Graduate School of Business, Stanford University. I do both teaching and research in the field of financial management and managerial economics. I also engage in a wide range of consulting work.

I graduated with a First Class Honors Degree in Economics from the University of Rangoon, Burma, in 1940. I did graduate study at the University of Chicago from 1947 to 1950, where I received my degree of Doctor of Philosophy in finance. I was tutor in the Department of Economics, University of Rangoon in 1940 and 1941. I was a Lieutenant, Burma Division, Royal Navy, from 1942 to 1947.

I was on the faculty of the Graduate School of Business, University of Chicago, from 1948 to 1961, as Professor of Finance from 1957 to 1961. I have served as Visiting Professor at the Massachusetts Institute of Technology and at the University of North Carolina. I have lectured abroad on all six continents.

From 1970 to 1971 I was a member of the Presidential Commission on Financial Structure and Regulation. In June 1971 I was appointed to the President's Council of Economic Advisers in Washington, D.C., where I served until March 1973.

I was Editor of *The Journal of Business* from 1953 to 1957 and I have also served as a member of the Editorial Board of the *Journal of Finance, The Journal of Quantitative and Financial Analysis,* and the *Journal of Business Finance.* I am currently Consulting Editor in Finance, Prentice-Hall, Inc.

Verified Statement of Ezra Solomon, Stanford University.

I have testified extensively: among others, before the Canadian Royal Commission on Coastal Shipping Policy, the U.S. Senate Banking and Currency Committee, the U.S. Senate Commerce Committee and the Ways and Means Committee of the U.S. House of Representatives, as well as before the Federal Power Commission, the Federal Communications Commission and before state regulatory bodies. In 1967 I testified on behalf of the government in *United States* v. *Winegar,* on the rate of return required for investment in oil shale operations.

I have edited and written books and articles in the general field of economics and finance. Among the books are: *An Introduction to Financial Management* (Santa Monica, Goodyear, 1977); *The Anxious Economy* (Stanford, 1975); *Wall Street in Transition* (New York University Press, 1974); *Money and Banking,* 5th ed. (New York: Holt, Rinehart & Winston, Inc., 1968); *Metropolitan Chicago: An Economic Analysis* (Chicago: Free Press, 1959); (ed.) *The Management of Corporate Capital* (Chicago: Free Press, 1959); *The Theory of Financial Management* (New York: Columbia University Press, 1963); (ed.) Capital Budgeting (a special issue of the *Journal of Business,* University of Chicago, 1955).

I am a member of the American Economic Association and the American Finance Association. I have served as Consulting Economist to the American Institute of Certified Public Accountants, and as Consulting Economist and Director to Dodge & Cox (Investment Counsel) and am now serving as Consulting Economist to Wertheim & Co., Inc.

I have lectured with fair regularity at the annual Life Officer's Investment Seminars, the annual seminar for the National Federation of Financial Analysts, The Stanford

Verified Statement of Ezra Solomon, Stanford University.

Investment Management Seminar and the Institutional Investors Seminar.

I am a Director of Kaiser Aluminum and Chemical Corporation, Encyclopaedia Britannica Inc., S-G Securities, Inc. and United Financial Corporation of California, and have served on the Finance Committee and the Investment Committee of the Board of Trustees, Stanford University.

Affidavit of Albert H. Fitzgerald, Chairman of The Suspension and Fourth Section Board Attached to Appendix B: Reply of Interstate Commerce Commission in Opposition to Application for Injunction, July 11, 1977.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

ALBERT H. FITZGERALD, first being duly sworn states as follows:

1. My name is Albert H. Fitzgerald. I am employed by the Interstate Commerce Commission, Washington, D.C. 20423, where I serve as Chairman of the Suspension and Fourth Section Board, a position I have held since February 13, 1977. I was acting chairman of the Suspension Board from December 1975 to February 1977.

2. I have served with the Suspension Board in various capacities since November 1958. Prior to that I served for two years as a tariff examiner. Prior to coming to the Commission I served with various transportation companies in rate and tariff capacities since 1939. I attended Boston University from 1946-1948 and have studied at the Traffic Managers Institute of New York from 1948-1950.

In my capacity as Chairman of the Suspension Board I am thoroughly familiar with the Commission's practices relating to initial suspensions. I have no doubt that the Commission has, and has exercised, its power to suspend initial rates.

Affidavit of A. H. Fitzgerald, ICC.

Counsel handling this litigation asked me to provide examples of cases wherein the Commission's Suspension Board suspended initial rates. The attached pages indicate such suspensions. Pages 2 and 3 show suspensions of "initial and only" tariffs.

These examples were selected after only a limited search. I am convinced that numerous other examples could easily be found.

.....
ALBERT H. FITZGERALD, Chairman
Suspension and Fourth Section Board

.....
date

Subscribed and sworn to before me this 11th day of July, 1977.

.....
Notary Public

My commission expires .....

APPENDIX

The Suspension and Fourth Section Board does not maintain a separate list of the cases brought before it that involve "initial rates". Each case is considered on its own merits and whether or not the rates are initial rates is not a determining factor in the Board's conclusions to suspend or not to suspend.

The following list of instances in which initial rates were suspended was compiled after a two-hour random search through the Board's files—a longer search would produce many more cases in which initial rates were suspended.

Initial rates were suspended in:

I. & S. Docket No. M-26913, *Printed Matter, Milwaukee, Wis., To Western & Pacific Coast States;*

I. & S. Docket No. M-27737, *Roofing, Southwestern States To Arizona;*

I. & S. Docket No. M-28004, *Foodstuffs, Indiana and Michigan To the South And Southwest;*

I. & S. Docket No. M-28962, *Malt Beverages, Specialized Truck Service, Inc.;*

I. & S. Docket No. M-29163, *Foodstuffs, Henderson, N.C., To Mechanicsburg And Pittsburgh, Pa.;*

I. & S. Docket No. M-27192, *Beer & Empty Beer Containers, Between St. Louis, & Ft. Dodge;*

I. & S. Docket No. M-29359, *Confectionery, Derry Township, Pa., To Midwest States;*

I. & S. Docket No. M-27903, *Particleboard, Washington And Oregon To Minnesota;*

I. & S. Docket No. M-27956, *Wood & Plastic Products, Maine To Calif., Colo., Fla., & Wash.;*

I. & S. Docket No. M-28735, *Soybeans, Indiana To Pennsylvania And New Jersey;*

I. & S. Docket No. M-27966, *Feed and Feed Ingredients, Southwest To West;*

In the following instances, the suspensions caused the carriers to be without any rates:

I. & S. Docket No. M-26993, *Malt Beverages, Minnesota To Washington;*
initial rates for authority to be granted in MC-138363-TA suspended on 6/15/73 by vote of Board Members Babst, Holmgren, and Halvarson—Members Seeds and Fitzgerald not participating; suspended rates found unjust and unreasonable by Review Board 4, Members Brown, Fitzpatrick, and Shaw;
carrier's proposed Tariff MF-ICC 2 was suspended in its entirety;
the carrier had no other rates—its earlier tariff (MF-ICC 1) had also been suspended in its entirety (in I. & S. Docket No. M-26866);

I. & S. Docket No. M-26866, *Malt Beverages, Minnesota To Washington;* (see above)
initial rates for authority to be granted in MC-138363-TA suspended on 5/2/73 by vote of Board Members Seeds, Babst, Fitzgerald, Holmgren, and Halvarson;
carrier's proposed Tariff MF-ICC 1 was suspended in its entirety; the suspended tariff was later cancelled and a new

tariff (MF-ICC 2) was issued which was also suspended (in I. & S. Docket No. M-26993);
the carrier had no other rates;

I. & S. Docket No. M-25540, *Cleaning & Chemical Compounds, To Oregon & Washington;*
initial rates for authority to be granted in MC-136089-TA suspended on 2/14/72 by vote of Board Members Babst, Fitzgerald, and Holmgren—Members Hilton and Seeds not participating; the contract carrier's proposed Schedule MF-ICC 1 was suspended in its entirety;
carrier had no other rates;

I. & S. Docket No. M-28715, *Lime Rock, Duluth, Minn., To Drayton, N. Dak.;*
initial rates for authority to be granted in MC-140968-TA suspended on 8/25/75 by vote of Board Members Seeds, Fitzgerald, Babst, Holmgren, and Halvarson;
contract carrier's proposed Schedule MF-ICC 1 was suspended in its entirety;
carrier had no other rates;

I. & S. Docket No. M-27940, *Lead, Baton Rouge, La., To Points In Central States;*
initial rates for authority to be granted in MC-139727-TA suspended on 8/20/74 by vote of Board Members Fitzgerald, Babst, and Halvarson;
Item 100 in contract carrier's proposed Schedule MF-ICC 1 was suspended in its entirety;
carrier had no other rates;

I. & S. Docket No. M-28723, *Bricks, Endicott, Nebr., To Western States;*
initial rates for authority to be granted in MC-140225 (Sub 1-TA) were suspended on 8/28/75 by vote of Board Members Babst, Holmgren, and Halvarson—Member Fitzgerald voted not to suspend;
Item 100 to contract carrier's proposed schedule MF-ICC 1 was suspended in its entirety;
carrier had no other rates;

I. & S. Docket No. M-27380, *Malt Beverages & Empty Containers, Between Calif. & Oreg.;*
initial rates for authority to be granted in MC-138946-TA were suspended on 11/28/73 by vote of Board Members Seeds, Fitzgerald, Babst, Holmgren, and Halvarson;
Items 200 and 220 to proposed Schedule MF-ICC 1 were suspended in their entirety;
carrier had no other rates;

I. & S. Docket No. M-27682, *Bakery Goods, Phoenix, Ariz., to San Diego, Calif.;*
initial rates for authority to be granted in MF-139239-TA were suspended on 4/24/74 by vote of Board Members Seeds, Fitzgerald, Babst, Holmgren, and Halvarson;
Items 100 and 110 also Supplement 1 to contract carrier's proposed Schedule MF-ICC 1 were suspended in their entirety;
carrier had no other rates.

Motion of State of Alaska for Leave to Intervene, July 12, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

MOTION FOR LEAVE TO APPEAR AS PARTY PURSUANT TO 28 U.S.C. §§ 2323 AND 2348, AND RULE 15 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Comes now The State of Alaska, pursuant to 28 U.S.C. §§ 2323 and 2348 and Rule 15(d) of the Federal Rules of Appellate Procedure, and moves this court for leave to intervene and appear as a party in the above case involving review of an Order of the Interstate Commerce Commission. As grounds for granting this motion, movant respectfully shows the following:

1. The State of Alaska (hereafter referred to as Alaska) has participated as a party in interest to the proceedings before the Interstate Commerce Commission in its Investigation and Suspension Docket No. 9164, *Trans Alaska Pipeline System* (Rate Filings), which led to the order under review. Alaska, for the limited purpose of opposing Petitioner's attempt to obtain judicial order which would annul, set aside and enjoin the Commission's suspension Order, supports the Order issued by the Commission Decision served June 28, 1977. Alaska desires to participate in this proceeding as a party in support of the respondents.

2. The State of Alaska has a significant interest in the Commission's Order which is here under attack.

All of the Prudhoe Bay oil field lies entirely on State lands and constitutes—to a degree unique in the United States—a public asset, owned by the people of Alaska. Alaska is relying heavily on these oil resources to finance

current and future State needs. Consequently, the matter of the transportation costs to be borne by that crude oil and its effect on the State of Alaska is of vital interest to all Alaskans.

As a direct source of revenue to Alaska and its citizens, Alaska owns a one-eighth interest as a royalty share in the oil. In addition, Alaska has an oil production severance tax. Both the value of the royalty oil and the severance tax are tied to the value of the oil at the point of production, i.e. the wellhead value. The wellhead value is generally determined by the market price less the cost incurred in reaching the market, i.e. the transportation cost. Therefore, as the TAPS rates increase the value of Alaska's interest decreases.

In total, the State of Alaska has an approximate 20 percent interest in the wellhead value of all oil from the Prudhoe Bay Field. Based upon present estimates that the flow of oil through the line shortly after start-up will reach a level of 1.2 million barrels per day, the significance of each one cent change in the rate can be measured. One cent per barrel is the equivalent of $12,000 per day. On the assumption that each one cent change in the rate, whether an increase or a decrease, results in an equal change in the net wellhead value from a fixed selling price, each one cent change in the rate would, therefore, change the wellhead value of the oil by $12,000 per day at a production rate of 1.2 million barrels per day. Alaska's 20 percent interest in the wellhead value of the oil would, therefore, be the equivalent of $2,400 per day for each 1 cent change in the transportation charge.

On an annualized basis reflecting the transportation of 438 million barrels per year at a daily rate of 1.2 million barrels per day, Alaska's 20 percent interest in a one cent fluctuation charge in the transportation charge is the

equivalent of $876,000 per year. Clearly Alaska has a crucial interest in seeing that the rate charged, particularly the initial rate that goes into effect at the start-up of the line, is just and reasonable and does not reflect excessive returns to the individual pipelines and their oil company owners.

3. For the foregoing reasons, the State of Alaska is entitled under the provisions of 28 U.S.C. §§2323 and 2348 and Rule 15(d) of the Federal Rules of Appellate Procedure to intervene in this case.

WHEREFORE, the State of Alaska prays leave to intervene in this case in support of the respondent.

Respectfully submitted,

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Dated: July 9, 1977

Excerpts from Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injuncion and Temporary Restraining Order, July 13, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

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The Commission's calculations assumed the allowable nature of *all* of the respondent pipelines' revenue requirements including:

(1) all claimed operating expenses regardless of amount and to whom paid (substantial payments are made to affiliated companies);

(2) all depreciation expenses, reflecting a recovery of the entire cost of construction over an abbreviated "economic life" of only 25 years which is substantially shorter than the anticipated service life of the pipeline;[1]

(3) all removal costs as estimated by the TAPS carriers, without modification, similarly recovered over a shortened life of only 25 years;[2]

(4) all annualized interest costs alleged by the TAPS carriers to be incurred in connection with the debt financing

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1. If any oil is found anywhere in Alaska, on shore or offshore, which would be tributary to the TAPS system, it would, of course, lengthen the economic life of TAPS. The U.S. Geological Survey estimates that there is a 95% probability that there is at least 9 billion more barrels of undiscovered but recoverable crude oil reserves in Alaska. Table 4, p. 28-29. Geological Estimates of Undiscovered Recoverable Oil and Gas Resources in the United States, Geological Survey Circular 725.

2. Removal costs were "estimated" by an unidentified consultant to Alyeska Pipeline Service Company, Alyeska being the TAPS carriers' agent, at $1.049 million in 1977 dollars. This cost was amortized over 25 years without increase for inflation or decrease for the earning capacity of the fund being generated. Order of June 28, 1977, page 5.

of the cost of construction (including the capitalization of interest charges during construction);[3]

(5) collection of inferred or imputed sums sufficient to pay both federal (48 percent) and state (9.4 percent) income taxes;[4]

(6) an allowance for a return on the equity for each of the pipelines in amounts ranging from 50.7 cents to 85.5 cents per barrel.[5]

• • •

3. Interest expenses will be adequately covered by the Commission's allowance of a ten percent (10%) return on "valuation". ICC "valuation" *exceeds* the original cost. Since, on the average, TAPS is at least 85 percent debt financed, coverage of the cost of capital on 85 percent of the investment is assured by the payment of interest costs.

4. There has been no showing by the TAPS carriers that such if any income taxes will actually have to be paid. An imputed tax allowance creates a cash flow available to the carrier at no cost until the time, somewhere in the indefinite future, when deferred taxes might have to be paid. See, *The Second National Natural Gas Rate Case,* U.S. App. D.C. , F.2d (No. 76-200 et al, June 16, 1977); *Memphis Light, Gas & Water Div.* v. *F.P.C.*, U.S. App. D.C. 500 F.2d 798 (1974). *People of the State of California* v. *FPC*, 506 F.2d 228, 232-33 (D.C. Cir. 1974).

5. The additional return of 72 cents per barrel to Mobil Alaska Pipeline Company, which has no equity according to all figures made available to the Commission, thereby results in an infinite percentage return to Mobil on its equity. The equity returns vary on a percentage basis from 13.30 percent for Amerada Hess up to 54.25 percent for ARCO.

Affidavit of J. D. Wessling, Comptroller, Treasurer and Secretary of ARCO Pipe Line Co. in Support of Application for Interlocutory Injunction, July 14, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

AFFIDAVIT

THE STATE OF KANSAS }
COUNTY OF MONTGOMERY }

J. D. WESSLING, being duly sworn, deposes and says:

I am Comptroller, Treasurer and Secretary and Manager, Administrative and Control of ARCO Pipe Line Company ("ARCO"), the Petitioner in this proceeding. I make this Affidavit in support of Application for Interlocutory Injunction restraining and suspending an order of the Interstate Commerce Commission which suspends for a period not to exceed seven months a tariff filed by ARCO with the Commission for the transportation of crude oil in the Trans Alaska Pipeline System ("TAPS").

ARCO owns a 21.00% undivided interest in TAPS. Schedule A to this affidavit shows projected operating results for ARCO for its share of TAPS over the seven-month period ending January 31, 1978, the approximate period of the suspension ordered by the I.C.C.

The figures appearing on this Schedule A are compiled from data furnished by ARCO to the I.C.C., on which the I.C.C. bases the calculations appearing in the appendices to its order now under review.

The figures on Schedule A reflect a build-up over the period covered in the amount of oil to be transported by ARCO. The I.C.C.'s calculations are based on operation for a full year at a rate which our figures show will not actually be reached until late in the suspension period. By the I.C.C.'s approach, ARCO would transport about 46.4

million barrels over the suspension period; actually, as Schedule A shows, we estimate ARCO will transport only 34.8 million barrels over that period, with correspondingly less revenue.

Schedule A shows operating results based on two different tariff rates. The figures in the left-hand column use the $6.04 initial rate tariff filed by ARCO, which the I.C.C. has suspended. The figures in the right-hand column use the $4.91 rate which the I.C.C. has said it would approve. As Schedule A shows, under the I.C.C. suggested rate ARCO's revenues would be, over the seven-month suspension period, $39.3 million less than under ARCO's suspended tariff.

In fact, as Schedule A shows, the $4.91 tariff will result in a deficiency in net income to ARCO of at least $26.1 million over the seven-month suspension period compared with the I.C.C.'s intended 10% return.

J. D. WESSLING
J. D. Wessling

[Sworn to on July 13, 1977.]

SCHEDULE A

ARCO PIPE LINE COMPANY

Operating Results for the Seven Months Ending January 31, 1978

Throughput (millions of barrels) (Note 1)	34.776	34.776
Tariff (dollars per barrel)	$ 6.04	$ 4.91
	(millions)	
Revenues	$ 210.1	$ 170.8
Operating Expenses:		
Operations and Maintenance	$ 32.3	$ 32.4
Provision for Dismantling Cost	4.4	4.4
Ad Valorem Taxes	13.7	13.7
Gross Receipts Taxes (¼ of 1%)	.5	.4
Provision for Depreciation	38.6	38.6
Interest	72.0	72.1
Total Operating Expenses	$ 161.5	$ 161.6
Income before Income Taxes	$ 48.6	$ 9.2
Provision for Income Taxes @ 52.32%	25.4	4.8
Net Income	$ 23.2	$ 4.4
Valuation per I.C.C.	$2,036.0	$2,036.0
10% (per I.C.C.) for 184 days	$ 102.6	$ 102.6
Less Interest	72.0	72.1
Net Income Allowable per I.C.C.	30.6	30.5
Deficiency (net income less than allowable)	7.4	26.1
Rate of Return on Valuation (Note 2)	9.3%	7.5%

NOTES:

1. Throughput estimates are ARCO's 21% of .6 million barrels per day ($\overline{M}$BD) from August 1, to October 31, 1977 and 1.2 $\overline{M}$BD from November 1, 1977 to January 31, 1978. The only change from previous estimates is to add August, 1977, at .6 $\overline{M}$BD. It is now estimated that volumes will not exceed .8 $\overline{M}$BD during the suspension period because of recent damage to Pump Station No. 8.

2. Interest plus net income, annualized, divided by Valuation per I.C.C.

Motion of Respondent United States of America For Consolidation and to Dismiss, (all cases) July 14, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

The United States of America moves this Court to consolidate the above-captioned cases with case No. 77-2392, *Mobil Alaska Pipeline Company* v. *United States et al.*

The United States further moves this Court to dismiss the petitions for review in Nos. 77-2412, 77-2421, and 77-2437.

1. In support of its Motion to Consolidate the United States submits that each of the aforesaid petitions seeks judicial review of a June 28, 1977 Order of the Interstate Commerce Commission which suspended proposed Trans Alaska Pipeline System (TAPS) tariffs filed by the respective petitioners. Consolidation of these actions would conserve the time of the Court and facilitate review of the subject order. The Clerk of this Court is empowered under Local Rule 10(a)(9) to grant an unopposed Motion for Consolidation.

2. In support of its Motion to Dismiss the petitions in Nos. 77-2412, 77-2421, and 77-2437, the United States refers this Court to its July 12, 1977 Motion to Dismiss the petition in No. 77-2392 and memorandum in support thereof, *Mobil Alaska Pipeline Company* v. *United States,* and hereby incorporates by reference the points and arguments made therein.

3. The United States submits that the petitions in Nos. 77-2412, 77-2421, and 77-2437 raise no significant issues not disposed of in its Motion to Dismiss and memorandum in support thereof in No. 77-2392. This Court may grant the relief requested herein on the papers thus far submitted.

Motion of United States to Dismiss.

4. The United States, however, is preparing an additional memorandum addressed to those issues raised in Nos. 77-2412, 77-2421, and 77-2437 not raised by petitioner Mobil Alaska Pipeline Company in No. 77-2392 which will be filed with this Court by Friday, July 15, 1977.

The United States, therefore, prays that the Court enter an order consolidating the above-captioned cases with case No. 77-2392, dismissing the petitions of BP Pipelines Inc., Exxon Pipeline Company, and Arco Pipe Line Company for review of an order of the Interstate Commerce Commission and granting such other relief as the Court deems just and proper.

Respectfully submitted,
JOHN H. SHENEFIELD,
Acting Assistant Attorney General,

DONALD L. FLEXNER,
Acting Deputy Assistant Attorney General,

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[Certificate of Service Omitted in Printing]

Excerpts from Memorandum of Arctic Slope Regional Corporation In Opposition To Application of Mobil Alaska Pipeline Co. for Interlocutory Judgment and Temporary Restraining Order, July 14, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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II.

BACKGROUND

The interest of the Arctic Slope Regional Corporation ("ASRC") and Alaska Natives in this proceeding derives from the unique relationship between Native land claims and oil development in Alaska. The Commission's suspension of Mobil Alaska's proposed TAPS' tariff cannot be reviewed without an appreciation of this relationship and the impact of TAPS' tariffs generally on Native interests in Alaska.

A. *Native Claims, Alaska Oil Development and the Trans-Alaska Pipeline System*

Prior to the enactment of the Alaska Native Claims Settlement Act ("ANCSA") on December 18, 1971, the Inupiat Eskimos held claims of unextinguished aboriginal title to the entire Arctic Slope of the State of Alaska, an area which encompasses Prudhoe Bay and much of the land over which TAPS was constructed. *See* Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land,* 459, Figure V-19 (1968); Protests to Land Selections by State of Alaska, Protest #F-035257; 43 U.S.C. § 1601(a). Other Native people of Alaska (Eskimos, Aleuts, and Indians) had similar and substantial claims to other areas of the State. *Alaska Natives and the Land,* ch. 5.

The Supreme Court has repeatedly declared that aboriginal title gives exclusive possessory rights to Indians which

can be extinguished only by act of Congress. *E.g., Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974); *United States* v. *Santa Fe Pacific R.R. Co.,* 314 U.S. 339 (1941). Between 1867, when Alaska was purchased from Russia, and 1971, Native rights of use and occupancy in that territory were preserved and protected by regulations of the Department of the Interior, *e.g.,* 43 C.F.R. § 2091, 6-3, and by congressional acts. Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26; Act of March 3, 1891, ch. 561, § 14, 26 Stat. 1096, 1100; Act of June 6, 1900, ch. 786, § 27, 31 Stat. 321, 330; Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339 (Alaska Statehood Act). Because Native land claims in Alaska encompassed 90% of the State, those claims were, before their extinguishment, a substantial obstacle to oil development in Alaska and to TAPS' construction.

In the mid-1960's pressures for oil development of Native lands in the Arctic Slope began to mount. By all means available to them, Arctic Slope Eskimos and other Alaska Natives vigorously protested actions by the State of Alaska and others which would have deprived them of their aboriginal lands. *E.g., Alaska Natives and the Land,* Figure V-19. In response to these protests and the United States' fiduciary duty to Native Americans, the Secretary of the Interior imposed a "land freeze" in 1966, halting all transfers of public lands in Alaska pending resolutions of Native land claims. P.L.O. No. 4582, 34 Fed. Reg. 1025 (1969); S. Rep. No. 92-405, 92d Cong., 1st Sess. 97 (1971) (discussing Native protests and resulting informal freeze orders). The land freeze, upheld in *State of Alaska* v. *Udall,* 420 F.2d 938 (9th Cir. 1969), and the discovery of oil on the Arctic Slope greatly increased pressure on Congress to resolve the competing claims of Alaska Natives and the State of Alaska so that oil development could proceed.

On December 18, 1971, Congress enacted the Alaska Native Claims Settlements Act to eliminate Native land rights as an obstacle to oil development and pipeline construction. Section 4 of the Act extinguished all aboriginal land claims in Alaska, including the Arctic Slope Eskimos' claim to Prudhoe Bay. 43 U.S.C. § 1603. ANCSA also transferred to the State of Alaska substantial portions of Prudhoe Bay that had been selected by the State under color of the Statehood Act. 43 U.S.C. § 1613(g).

As compensation for that extinguishment, ANCSA granted Alaska Natives fee title to approximately 40 million acres of land. 43 U.S.C. § 1611, 1613. All future revenues derived from that land will be the property of the Alaska Native people. 43 U.S.C. § 1606.

ANCSA also provided for cash compensation of $962,500,000 to be paid over a period of years. $462,500,000 of that settlement will be paid by the United States from appropriated funds. 43 U.S.C. § 1605. The remainder will be paid on revenues derived from a 2% royalty on the wellhead value of all crude oil production in Alaska under state or federal leases. 43 U.S.C. § 1605, 1608.

Thus, from a pre-1971 position of opposition, Alaska Natives found themselves dependent on Alaska oil and gas development after ANCSA. Substantial areas of land, particularly those received by ASRC, given to the Natives in exchange for extinguishment of aboriginal title have little value except for oil and gas development. More than half of the funds to be paid to Alaska Natives must be derived from royalties on oil production.

Native interests are also closely tied to TAPS itself, which allows the marketing of oil on which ANCSA's settlement turns. Prior to the passage of ANCSA, eight oil companies that had state leases on the 10 billion barrel

reserves at Prudhoe Bay, joined together to form a consortium to construct and operate a pipeline to transport their oil to market. After passage of ANCSA, those companies formed the Alyeska Pipeline Service Company. After numerous delays and significant litigation, Congress finally acted in 1974 to authorize directly construction of TAPS and to assure full federal cooperation. Trans-Alaska Oil Pipeline Authorization Act, 67 Stat. 557, 43 U.S.C. §§ 1551-55. One of the reasons advanced by the pipeline companies for passage of that Act was that its early completion would benefit Alaska Natives.

B. *Impact of TAPS' Tariffs on ASRC and Alaska Natives.*

ASRC and the twelve other regional corporations created by ANCSA have specific responsibilities for the administration of ANCSA's land claims settlement period. These responsibilities include investment and distribution of settlement funds, selection of land granted under the Act, management of those lands, assisting village corporations, and general responsibility for economic development of major Native regions of Alaska. *See generally* 43 U.S.C. § 1606.

ASRC, for the benefit of its nearly 4,000 Inupiat Eskimo shareholders, was granted selection rights by ANCSA to approximately 5.5 million acres of surface and subsurface lands on the Arctic Slope in exchange for extinguishment of its aboriginal claims to 56 million acres. Since 1972 ASRC has selected its entitlement and has received interim conveyances to approximately 4.5 million acres from the United States.

These lands, most of which are far from Native Villages, are virtually the only economic asset of the Inupiat Eski-

mos. Thus, whether one of America's last settlements with this country's original inhabitants will have any meaning for the Inupiat Eskimos will turn directly on the oil and gas revenues which can be derived from these lands.

The impact of TAPS' tariffs on the economic interest of ASRC and its Native shareholders is direct and immediate. The value of ASRC's lands and the amount of revenue which can be derived from oil development on those lands is tied directly to the wellhead price of crude oil on the Arctic Slope. Under present economic conditions, that wellhead price is inversely related to the tariff rate charged on TAPS. A TAPS tariff of $6.00 instead of $3.00 means that the wellhead price of crude oil on the Arctic Slope will be $3.00 lower. Excessive TAPS tariffs will cause substantial harm to ASRC and the Inupiat Eskimos in four specific ways:

1. Because the value of ASRC's Settlement Act lands turns almost exclusively on the amount of oil and gas revenues which can be generated from them, high TAPS tariffs, which drive down the amount of revenue which can be generated from those lands, directly reduce the value of those lands for lease or sale.

2. If, as is likely, oil reserves suitable for commercial development are found on ASRC's lands adjacent to TAPS, crude oil will be tendered for shipment on TAPS by ASRC or its lessees. High TAPS tariffs will directly reduce the revenues derived from these shipments.

3. On behalf of the Inupiat Eskimos, ASRC will receive a share of the 2% royalty imposed by ANCSA on all crude oil production in Alaska occurring

under state or federal leases. The higher the wellhead value of oil produced under such leases, the sooner the Alaska Native Fund will receive and distribute the $500 million granted by ANCSA. Any delay in the receipt of these royalty payments will substantially reduce the value of those payments to ASRC and all Alaska Natives.

4. Under § 7(i) of ANCSA, ASRC is a beneficiary of a proportionate share of 70% of all revenues from crude oil production occurring on lands owned by the other 11 regional Native corporations. To the extent that such oil is shipped on TAPS, or that TAPS tariffs fix other pipeline tariffs in Alaska, high TAPS tariffs will drive down the value of these revenues to ASRC and all Alaska Natives.

In each of these instances, the benefits granted to ASRC by the United States in compensation for the extinguishment of its aboriginal title will be diminished to the extent that crude oil owned by ASRC, or crude oil owned by others to which ASRC has a revenue entitlement, is shipped through TAPS at the proposed rates. For a summary of the effect of TAPS tariffs on the wellhead price of Arctic Slope crude oil and the pay-out period for the Alaska Native Fund, see Exhibit A attached hereto.

For these reasons, the present controversy is more than a simple argument between shippers and carriers over shipping rates. ASRC believes that the Commission's action challenged herein was designed in part to insure that the value of ANCSA's settlement to Alaska Natives is not siphoned off in the form of pipeline profits from excessive TAPS tariffs.

III.

An Overview of this Controversy

At least four general factors are important to an understanding of the context in which Mobil Alaska's motion arises.

First, petitioner Mobil Alaska and the other TAPS common carriers are vertically integrated with the producing companies which will ship oil through the pipeline. These parent companies also own a share of production from Arctic Slope reserves that is within two or three percentage points of their ownership shares in TAPS. BP and Sohio, whose interests in this area are controlled by the terms of a merger agreement, together own 49.18% of the pipeline and 52.2% of the Prudhoe Bay field. Exxon owns 20% of the pipeline and 20.3% of the field. Arco owns 21% of the pipeline and 20.3% of the field. Phillips owns 1.66% of the pipeline and 2% of the field. Mobil owns 5% of the pipeline and 2.17% of the field. Only 2.1% of the field is not owned by TAPS carriers.

For this reason, Mobil's claim that the Commission's decision "awarded damages" or allows respondents to "reap the spoils," Mobil Mem. at 1, 2, is irrelevant rhetoric. Since the delivered market price of Arctic Slope oil will not be affected by transportation costs, any tariff reductions will increase the wellhead price paid to the producer oil companies. Consequently, any reduction in revenues from lower TAPS' tariffs will be substantially offset by additional profits attributable to increased wellhead prices.

Second, the oil companies have strong economic incentives to maintain high TAPS' tariffs and low wellhead prices. With the demise of the oil depletion allowance, ANCSA's provisions for royalty payments, and the imposition of severance taxes on the wellhead price of oil by the State of Alaska, TAPS owners have strong incentives to channel profits through pipeline operations and to maintain production prices as low as possible.

Third, Mobil Alaska's complaint that the Commission conducted "an informal proceedings concluded in a matter of days in which no factual record was developed," Mobil Mem. at 1, is entirely the consequence of a deliberate choice made by petitioner and the other TAPS carriers. Mobil Alaska, for example, issued its tariff on June 10, 1977, to be effective on June 20, a bare ten days' notice to the Commission and other parties involved. Because these tariffs involve a project which has been planned for more than eight years and has been three years in actual construction, the decision to impose tariffs on such short notice can only be deliberate. Mobil Alaska cannot now be heard to complain of the consequences.

Mobil Alaska's complaint regarding the factual record before the Commission is similarly without merit. All of the data on which a proper TAPS tariff can be based is in the hands of petitioners and the other TAPS carriers. If they have failed to place this information before the Commission, they are estopped from objecting. Moreover, as the Commission's order demonstrates, the decision appealed from was, for the most part, based on figures supplied by the carriers themselves. Interstate Commerce Commission, Investigation and Suspension Docket No. 9164, Order at 5 [hereinafter "Order"].

Fourth, and perhaps most importantly, the Commission's action challenged here allows Mobil Alaska and the other TAPS carriers to operate the pipeline at a very handsome rate of return. Using data supplied by the TAPS carriers themselves, the Commission found that the originally filed

rates would produce returns on equity ranging from 31% to 96%. Order at 6.[1]

Interim tariffs which the Commission has indicated it would permit produce returns on equity, *after taxes*,[2] of 16.8% to 20.6%. Since Mobil Alaska indicates that it has invested no equity whatsoever in its share of TAPS, any rate of return it receives will be infinite.

These four points alone underscore the weakness of Mobil Alaska's claim that the court's equity powers should be exercised on its behalf.

IV.

Mobil Alaska Meets None of the Standards for Preliminary Injunctive Relief

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B. *Mobil Alaska Will Suffer No Irreparable Harm if the Requested Injunction Is Denied.*

As Mobil Alaska acknowledges at the outset, the burden of proof is on it to demonstrate irreparable harm which will occur unless injunctive relief is granted. Mobil Mem. at 11. As Mobil Alaska also acknowledges, the practical effect of the Commission's order gives it two alternate courses of action: (1) to refile a proposed tariff of $4.84 per barrel and to operate as a common carrier at that rate for the next

1. ASRC believes that more accurate data and use of lawful rate calculation methodologies would show that the originally filed TAPS tariffs would produce rates of return substantially in excess of those figures. For a review of computations of TAPS tariffs based on modified carrier data and methodologies, see Exhibit B hereto which shows that TAPS tariffs as low as $3.69 to $2.24 (under varying assumptions) would produce equity returns of at least 8%.

2. At an assumed tax rate of 52.9%.

seven months, or (2) to suspend common carrier operation until the Commission completes its determination as to the lawfulness of Mobil Alaska; originally filed rate or until January 29, 1978, whichever should come first. Verified Petition of Mobil Alaska at 23-24. Mobil Alaska has not even attempted to show that it would suffer irreparable harm if it chose either of these alternatives.

1. *Mobil Alaska Has Made No Showing That It Will Suffer Irreparable Harm From Seven Months of TAPS Operations at a $4.84 Tariff Rate.*

To show harm or harm resulting from the Commission's suspension order, Mobil Alaska must demonstrate that the final tariff it will be allowed to charge for transportation of crude oil on TAPS will exceed $4.84 per barrel. If the Commission sets the final TAPS tariff at $4.84 or any lower figure, petitioner will have suffered no harm, let alone irreparable harm, from the Commission's suspension order. Mobil Alaska, however, has offered no such evidence.

Mobil Alaska argues only that it will suffer a gross revenue loss. However, if the Commission sets the final tariff at $4.84 or any lower figure, that gross revenue would have been the result of an unlawful tariff and Mobil Alaska would be compelled to refund the entire sum to shippers as overcharges. Absent proof that the final TAPS tariff will exceed $4.84 and hence that Mobil Alaska will not have to refund the entire sum alleged as a revenue loss, Mobil Alaska has not shown that it will suffer any economic loss if an injunction is denied.

Even if Mobil Alaska had attempted to show that the final "just and reasonable" tariff rate for TAPS would exceed $4.84 per barrel, the effort would not be convincing. By

making simple adjustments to the data supplied by the TAPS carriers themselves, and basically by reducing equity return rates from a range of 31% to 95% (based on the tariffs proposed by the TAPS carriers) to a composite return on equity *after taxes* of 23%, the Commission arrived at the $4.84 figure as a suggested tariff for Mobil to Alaska. This computation totally ignored the evidence and argument supplied by ASRC and other protestants before the Commission that the tariffs should be substantially lower than $4.84 because even that figure reflected improper cost data, improper tax and depreciation methodology and improper rate computation methodologies. As the following brief discussion demonstrates, there is a virtual certainty that the final TAPS tariff to be set by the Commission will be *significantly lower* than $4.84.

(a) *Mobil Alaska's Proposed TAPS Tariff Improperly Deducted Interest Expense in Calculating Rate of Return on the Valuation of the TAPS System.*

Appendix 3 to the Commission's order sets forth the effect of the $6.31 per barrel tariff rate originally filed by Mobil. At that rate Mobil would achieve a 13.8% return after taxes on its total investment. Because Mobil's tariff rate is based on a computation which allowed it to treat the cost of its borrowed funds as an operating cost, and because no equity capital is invested in Mobil Alaska, the 13.8% return on total investment is a staggering gift. The rate of return based on equity is infinite.

ASRC believes that deduction of interest which is paid upon borrowed funds as an operating cost, and inclusion of borrowed funds in the base upon which a tariff rate is calculated gives carriers a classic "double-dip" at the expense of shippers and Alaska Natives and plainly results in excessive and unreasonable rate tariffs. The Commission properly disallowed the first dip. Accordingly, there is no substantial basis to believe that the final TAPS' tariff for Mobil Alaska will be substantially higher than $4.84.

(b) *Mobil Alaska's Proposed TAPS Tariff Is Based Upon an Unreasonably High Capital Base.*

In 1969 TAPS proponents stated that the project would cost $900 million. Speech by E. L. Patton, Chairman, Alyeska Pipeline Service Company, to Town Hall of California (May 17, 1977). In 1971, subsequent to enactment of the National Environmental Policy Act (NEPA), Mr. Patton estimated that TAPS would cost close to $2.5 billion. Note, 81 Yale L.J. 1592, 1629 n.172 (1972). Mobil now states that TAPS costs will exceed $9 billion. Verified Petition of Mobil Alaska at 6. Thus, between 1969 and 1977, TAPS costs increased by more than 900%. Even between 1971—when hard and reliable construction estimates were presumably made—and 1977, the costs increased by 260%.

This increase, in part, is the result of more than eight years' inflation and the cost of providing environmental safeguards; however, Touche, Ross and the General Accounting Office, and now the Commission, are currently investigating the extent to which a portion of this increase may be attributable to mismanagement and waste. If such mismanagement and waste is substantiated, these costs cannot be passed on to TAPS shippers.

Also, to the extent that interest rates on TAPS debt exceed a reasonable amount and are not comparable to rates paid by affiliates of TAPS carriers, this excess may not be passed on to TAPS shippers. If any significant reduction in capital cost is made for either of these items, the

adjusted figures would generate a tariff rate substantially lower than the $4.84 interim rate.

(c) *Mobil Alaska's Interim Tariff Is Improperly Based Upon a Twenty-five Year Amortization and Depreciation Period.*

The TAPS carriers have estimated the pipeline's useful life to be 25 years. But, the useful life of other pipelines owned by TAPS carriers range between 31 and 42 years, and previous estimates established TAPS' useful life at 35 years. If TAPS' useful life were 35 years, yearly amortization of pipeline removal expenses and annual depreciation charges would be substantially lower. The Commission has promised that this issue will receive "substantial attention in its formal investigation." Order at 5. Since the Commission's suggested $4.84 rate is based on the carrier's 25-year figure, any increase in the useful life of TAPS would reduce the rate still further.

(d) *Mobil Alaska's Proposed TAPS Tariff Is Projected Upon an Unrealistically Low Throughput of Oil.*

Mobil Alaska's net revenue projections are based upon a throughput of 1.2 million barrels of oil per day. The projection varies dramatically from earlier projections of 2 million barrels per day. *E.g.*, Note, 81 Yale L.J. 1592, 1627 n.156. Since operating income increases strongly with increased throughput, it can be assumed that the final tariff will be significantly reduced by the use of a more realistic higher throughput which ASRC understands can be expected after 1979 or 1980.

(e) *Mobil Alaska's Proposed TAPS Tariff Is Unrealistically Based Upon an Assumed Tax Rate of 52.9%.*

ASRC doubts that Mobil Alaska will pay any federal income taxes in 1977 or for a long time, if ever, thereafter. Similarly nothing in its corporate parent's tax-paying history in any way supports Mobil Alaska's projection of a 52.9% tax rate for purposes of computing its return on total investment or equity. Use of an actual rather than an "assumed" tax rate in TAPS tariff computations would further reduce the $4.84 interim rate.

(f) *Conclusion.*

As the Commission's order indicates, there are substantial questions concerning numerous aspects of the data and methodologies used by the TAPS carriers to justify their proposed tariffs. The Commission has promised a full investigation and review to analyze each of these issues. Since its $4.84 tariff was reached primarily by reducing the rate of return to the carriers from their TAPS operations without challenging their data or methodology, the likelihood that the ultimate TAPS tariff will be lower than $4.84 for Mobil Alaska verges on certainty. Thus, although petitioner Mobil Alaska has not even attempted to show that the Commission's order will cause it harm through loss of lawful revenues, such a showing could not have been made.

2. *Mobil Alaska Has Not Shown That Suspension of Pipeline Operations Would Cause It Irreparable Harm.*

The eight TAPS carriers may also respond to the Commission's order by suspending pipeline operations until such time as the Commission completes its determination

as to the lawfulness of their originally filed rates or until January 29, 1978, whichever should occur first.[4] Mobil Alaska alleges that suspension of operations would subject it to a revenue loss of "up to $88,000 per day for each day of this period." Verified Petition of Mobil Alaska at 23. Net revenue loss would obviously be lower.

Assuming *arguendo* that petitioner will suffer some substantial loss of *net* revenue, Mobil Alaska has made no showing that if commencement of pipeline operations is delayed, it will not recover the expenses of such delay from future tariff charges.

Suspending pipeline carrier operations simply postpones the time at which Mobil Alaska will begin to accumulate net revenues. The loss from such delay can be precisely calculated as the interest Mobil Alaska could have earned on such net revenues as they accumulated. Just as construction interest on borrowed funds is included in Mobil Alaska's rate base, so, too, presumably, would Mobil Alaska claim lost interest on net revenues which could not be collected because of compliance with the Commission's suspension order.

Thus, before petitioner Mobil Alaska can prove irreparable harm, under this alternative it must show (1) that if the injunction is not entered, the pipeline will not be operated, and (2) that interest on lost net revenues will not be provided for in its final TAPS' tariff.[5]

Accordingly, whether Mobil Alaska commences common carrier operations at the $4.84 tariff level suggested by the Commission, or whether common carrier operations are postponed until Mobil Alaska's $6.34 rate becomes effective, Mobil Alaska has not shown, and cannot show, that it will suffer irreparable harm of any kind.

4. Of course, the probability that the TAPS carriers would simply refuse to operate the pipeline for the next seven months is virtually zero.

5. Even under this alternative, proof that the final tariff will exceed $4.84 is required.

C. *ASRC Will Suffer Irreparable Harm if Injunctive Relief Is Granted.*

If injunctive relief is granted, Mobil Alaska will be allowed to commence pipeline operations at a tariff rate of $6.34 per barrel. As demonstrated above, and as found by the Commission, the likelihood that this rate is excessive and unlawful is virtual certainty. Any unlawful revenue retained even temporarily by TAPS carriers deters Alaska Natives from gaining their rightful place in Alaska's economy. Moreover, revenues lost to ASRC and to other Alaska Natives from the reduced wellhead price of oil on which their 2% royalty is based may never be fully recovered. There is no assurance that the producing affiliates of the pipeline companies would apply to the pipeline companies for any refunds that might be determined by the Commission since such an intercompany transfer would be subject to royalty payments and state severance taxes. Furthermore, the TAPS carriers do not concede the applicability of a refund condition to reconstruct the proper payments, adjusted for normal interest, once a proper tariff has been determined by the Commission.[6] Thus, although ASRC and Alaska Natives may ultimately recover the full amount to which they are entitled from the Alaska Native Fund, the interest lost by the delay in receiving that amount will not likely be recovered from Mobil Alaska and the other TAPS carriers.

6. *See, e.g.,* Petition of Exxon Pipeline Company For Reconsideration, ICC Investigation and Suspension Docket No. 9164 on July 8, 1977 at 3; Oral Argument of Robert E. Jordan, ARCO Pipeline Company, In the Matter of Trans-Alaska Pipelines System at 165-166 (June 27, 1977).

Further irreparable harm to the Inupiat Eskimos and the other Alaska Native people will result from a loss of revenue to the State of Alaska. Passage of ANCSA and termination of many federal responsibilities to Natives in Alaska has thrust increasing burdens onto the State which its oil revenues must pay for. Most Native villages desperately lack adequate schools, utilities, public health services, vocational training facilities, year-round recreational opportunities and many other public facilities and services that are taken for granted in other parts of the country. Any significant revenue loss for any substantial number of months would dramatically impact the State's efforts to fund schools and other programs in Native areas.

D. *Injunctive Relief Would Be Adverse to the Public Interest.*

Excessive TAPS tariffs will have a strong anti-competitive effect on all oil development on the Arctic Slope. Under present economic circumstances, the wellhead value of Alaska oil varies inversely with the TAPS' tariffs. Excessive tariffs will effectively limit access to and control of Arctic Slope development to those producers who can absorb the high tariffs, *i.e.,* Mobil Alaska and the other TAPS owners, who can recapture excessive shipping costs in the form of higher returns on their TAPS' investment. Other potential producers will be deterred from paticipating if they have to share up to $3.00 of the wellhead value of their oil with the TAPS carriers. The possibility of "reparations," "refunds," or "damages" will be unlikely to affect decisions by other companies not to explore and develop.

High tariff rates can be used as a classic tool by the TAPS' owners to prevent any competition from develop-

ing for the production and delivery of Arctic Slope crude oil. The strong public interest against such action would be affected most adversely by a decision of this court allowing Mobil Alaska to operate at a tariff rate which is plainly excessive and unlawful.

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Decision of Court of Appeals.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 77-2392, 77-2412, 77-2421 and 77-2437

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION, et al.,
Respondents,

and

SOHIO PIPE LINE COMPANY, AMERADA HESS PIPELINE
CORPORATION, UNION ALASKA PIPELINE COMPANY,
Intervening Petitioners,

STATE OF ALASKA AND
ARCTIC SLOPE REGIONAL CORPORATION,
Intervening Respondents.

BP PIPELINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION,
Respondents.

EXXON PIPELINE COMPANY,
Petitioner,

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION,
Respondents,

and

UNION ALASKA PIPELINE COMPANY,
Intervening Petitioner.

Decision of Court of Appeals.

ARCO PIPE LINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION, et al.,
Respondents,

STATE OF ALASKA,
Intervening Respondent.

July 29, 1977

On Petitions to Review an Order of the Interstate Commerce Commission.

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges.

PER CURIAM:

Four petitions seeking injunctive relief and review of a June 28, 1977 Order of the Interstate Commerce Commission are before us, together with the United States' motion to dismiss.[1] For reasons discussed below, we grant the government's motion.

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[1] No. 77-2392, Petition of Mobil Alaska Pipeline Company (Mobil) to Annul, Set Aside and Enjoin Enforcement of an Order of the Interstate Commerce Commission and Applications and Motions for Temporary Restraining Order and Interlocutory Injunction. The respondents in this case were the United States, the Interstate Commerce Commission (ICC or Commission) and the latter's individual Commissioners. The State of Alaska moved to appear as a party. The Arctic Slope Regional Corporation moved to intervene. Both opposed Mobil's petition. Sohio Pipe Line Company moved to appear as a party in support of Mobil's petition, as did Amerada Hess Pipeline Corporation. Union Alaska Pipeline Company moved to appear as a party.

No. 77-2412, Petition to Enjoin, Set Aside, Suspend and Review Order of the Interstate Commerce Commission and Motion to Stay, Restrain and Suspend Order of the Interstate Commerce Commis-

This controversy arose on the eve of the flow of crude oil through the Trans Alaska Pipeline System (TAPS)[2] which stretches from oil fields in Alaska's North Slope at Prudhoe Bay to Valdez, Alaska, some 800 miles distant. The pipeline was constructed by the Alyeska Pipeline Service Corporation, an agent for its eight owners.[3]

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sion filed by BP Pipelines, Inc. (BP), naming the United States and the ICC as respondents.

No. 77-2437, Petition for Review and Application for Interlocutory Injunction filed by Arco Pipe Line Company (Arco). The United States, the ICC and its individual Commissioners were named as respondents. Alaska also sought leave to appear as a party in opposition to Arco's petition.

No. 77-2421, Petition for Review and Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review, filed by Exxon Pipeline Company (Exxon), naming the ICC and the United States as respondents. Union Alaska Pipeline Company moved to appear as a party.

The United States moved for consolidation and to dismiss. The motion for consolidation was granted from the Bench during oral argument on July 19, 1977. The court hereby grants all motions to intervene.

[2] In 1968 massive reservoirs of oil were discovered at Prudhoe Bay. Plans to construct the pipeline were announced in 1970. From its beginning the pipeline has been grist for judicial mills. *See, e.g., Wilderness Society* v. *Morton*, 156 U.S.App.D.C. 121, 479 F.2d 842 (1975) (en banc); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *rev'g* 161 U.S.App.D.C. 446, 495 F.2d 1026 (1974). Indeed, it literally took an act of Congress to prevent further environmental litigation. Trans-Alaska Pipeline Authorization Act, 43 U.S.C.A. § 1652(d). Construction was thus delayed until 1974 and took three years

Oil began to enter the pipeline on June 20, 1977. An explosion and fire at pump station No. 8 on July 8, 1977, resulted in a temporary shutdown. The parties have informed the court that the first oil is expected to reach Valdez around July 26, 1977.

[3] Each of the following companies owns an undivided interest in TAPS:

[Footnote continued on page 8a]

Between May 27, 1977 and June 15, 1977, seven TAPS owners filed the tariffs[4] which are at issue here,[5] having effective dates ranging from June 20 to July 1, 1977. Protests were filed by the Department of Justice, the State of Alaska,[6] the Arctic Slope Regional Corporation,[7]

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[3] [Continued]

Company	Percentage Ownership
Mobil Alaska Pipeline Co.	5.00%
Sohio Pipe Line Co.	33.34%
Arco Pipe Line Co.	21.00%
Exxon Pipeline Co.	20.00%
BP Pipelines Inc.	15.84%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

These companies are subject to ICC regulation by virtue of the Interstate Commerce Act, 49 U.S.C.A. § 1(1)(b), which covers common carriers engaged in the transportation of oil by pipeline.

[4] Tariffs must be filed with the ICC pursuant to 49 U.S.C.A. § 6(1).

[5] Because Phillips, the eighth owner, filed its tariff on June 20, 1977 with an effective date of July 20, the time for filing protests had not expired by June 28, the date of the ICC's order. Phillips' tariff was thus not covered by the Order and is not before this Court.

[6] Alaska owns a one-eighth royalty interest in the oil from the Prudhoe Bay fields. In addition, Alaska has an oil production severance tax. Both the value of the royalty oil and the severance tax are tied to the value of the oil at the point of production, *i.e.*, the wellhead value. Alaska contends that the wellhead value is generally determined by the market price *less* the transportation costs. Therefore, as the TAPS carrier rates increase, the value of Alaska's interest decreases.

[7] Prior to the enactment of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.A. §§ 1601-1627, the Inupiat Eskimos held claims of unextinguished aboriginal title to the entire Arctic Slope of the State of Alaska, an area which encompasses Prudhoe Bay and much of the land over which TAPS was constructed. The Arctic Slope Regional Corporation is one of 12 corporations

and the ICC's Bureau of Investigation and Enforcement. The Commission heard oral argument on June 27, 1977 [8] without making any formal evidentiary record.[8a]

established pursuant to ANCSA to conduct Native Alaskan business for profit. 43 U.S.C.A. § 1606. As compensation for the extinguishment of all aboriginal land claims, ANCSA granted Alaskan Natives fee title to approximately 400 million acres of land. 43 U.S.C.A. §§ 1611, 1613. All future revenues derived from that land will be the property of the Native people. 43 U.S.C.A. § 1606. ANSCA further provided for cash compensation of $962,500,000 to be paid over a period of years, a portion of which is to be derived from a 2% royalty on the wellhead value of all crude oil production in Alaska under state or federal leases. 43 U.S.C.A. §§ 1605, 1608. Thus, on their theory, the Native Alaskans' revenue is inversely related to the rise in TAPS tariffs.

[8] Recognizing the importance of the controversy, the ICC, in an extraordinary move, bypassed its usual procedural channels and took the suspension proceeding for its own direct consideration. While Commission regulations consider a protest and petition to suspend "as addressed to the discretion of the Commission" 49 C.F.R. § 1100.42 (1976), suspension protests and petitions are in practice routinely referred to the Board of Suspension. See 49 C.F.R. § 1100.200 (1976); Mobil Memorandum In Support of Application for Interlocutory and Temporary Restraining Order at 7; Reply of Interstate Commerce Commission in Opposition To Application For Interlocutory Injunction and Temporary Restraining Order at 4. The Commission heard arguments for one full day before issuing its suspension order.

Although a transcript of that hearing was made, the papers on file with the Court contain only excerpts from that proceeding. *E.g.*, Appendix A to Justice Department's Memorandum in Support of Motion to Dismiss; Appendix C to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order. Also, the tariff filings themselves, with any supporting submissions, were not filed with the Court. On file with the Court, however, were several exhibits such as "Reply of Exxon Pipeline Company to Protests" (Appendices of Exxon Pipeline Company for Expedited Consideration or in the Alternative Stay Pending Review) and statements by C. R. Thompson, Controller-Treasurer of Mobil Alaska Pipeline Co. (Appendix D to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order).

[8a] The briefs of the parties contained references to the information which the ICC apparently had before it during the suspension

The ICC's June 28 Order [9] instituted an investigation into the lawfulness of the tariffs pursuant to 49 U.S.C.A. §§ 15(1)[10] and 15(7).[11] The rates filed were suspended

proceeding. Such information included: (i) written representations in the form of protests from the State of Alaska, the Arctic Slope Regional Corporation, the United States Department of Justice, and the Bureau of Investigations and Enforcement of the ICC (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 2); (ii) verified statements offered by the TAPS Carriers in support of their rate calculations (Memorandum in Support of Exxon Pipeline Company's Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review at 46) [hereinafter Exxon Memorandum]; (iii) statement of Dr. Michael J. Ileo (submitted with Alaska's protest) which discusses the unreasonableness of carriers' rate calculations (Exxon Memorandum at 46); (iv) sworn testimony of Raymond B. Gary, a Managing Director of Morgan Stanley & Company, and Dr. Ezra Solomon, Dean Witter Professor of Finance at the Graduate School of Business of Stanford University, filed in Ex Parte No. 308, *Valuation of Common Carrier Pipelines* (Exxon Memorandum at 38); (v) letters sent from Mobil Alaska Company to ICC (obtained under the Freedom of Information Act, 5 U.S.C.A. § 552) which deal with such topics as TAPS start-up, depreciation, dismantling and restoration, anticipated salvage, and estimated annual operating expenses (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunctions and Temporary Restraining Order at 25-6); (vi) calculation of the rates of return on valuation for 90 regulated pipelines for the years 1970-72, made by George M. Stafford, former ICC Chairman (Exxon Memorandum at 40-1); and (vii) a variety of carrier-provided data concerning the normal traffic volume for the beginning years of TAPS, costs, depreciation charges, and investment calculations (ICC June 28 Order at 5-7 and Appendices to Order).

[9] The Order is set forth as an Appendix to this opinion.

[10] 49 U.S.C.A. § 15(1) reads in pertinent part as follows:

> "Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation

of persons or property, as defined in section 1 of this title . . . is or will be unjust or unreasonable . . . the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged . . . and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be. . . ."

[11] 49 U.S.C.A. § 15(7):

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further

for seven months without prejudice to the filing of interim rates during the suspension period. The Commission additionally authorized the filing, upon not less than one day's notice, of interim rates which were not to exceed certain levels, subject, however, to the condition that the carriers keep account and that (i) the interim tariffs contain a refund provision to the effect that if the new rates exceed those subsequently authorized or prescribed by the ICC, the carriers will refund the excess with interest; and (ii) the carriers file a similar refund provision applicable to the original proposed rates. The Order thus had the following effect on the carriers' proposed rates per barrel:

	As Filed by TAPS Owners	Authorized By Order [12]	Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59
Arco Pipe Line Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corp.	6.22	Not Yet Acted Upon	
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

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order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. . . ."

[12] According to the ICC, these rates reflect a 10% rate of return on tentative valuation. See pp. 4-8 of the ICC Order, and Appendices 2-5 thereto.

The carriers estimate that the Order will result in an irretrievable $340 million loss over the seven-month suspension period.

The suspension left the pipeline company without tariffs on file, and they are forbidden by § 6(7) of the Act to engage or participate in the transportation of oil unless they file new tariffs. The carriers thus had two alternatives open to them. They could file new tariffs within the ICC guidelines or they could shut down the TAPS system for the seven-month suspension period. Unhappy with either choice, the pipeline companies filed their petitions and motions and the United States moved to dismiss.[13] This Court heard oral argument on July 19, 1977.

The major issues raised by the parties are (i) whether we have jurisdiction to review the ICC order; (ii) whether the Commission has the authority under 49 U.S.C.A. § 15 (7) to suspend the first and only ("initial") rate of a carrier; (iii) whether as part of a purported suspension order the ICC may prescribe or suggest optional maximum interim rates; (iv) whether the ICC's order authorizing the filing of maximum interim rates without a full hearing amounted to a prescription of rates within the meaning of 49 U.S.C.A. § 15(1); (v) whether the Commission acted outside its statutory authority in ordering the refund provisions in the tariffs; (vi) whether the Commission's action was arbitrary, capricious or constituted an abuse of discretion; (vii) whether the maximum interim rates authorized were confiscatory in violation of the Fifth Amendment.

1. Reviewability and the authority of the Commission

The government has moved to dismiss the petitions for review on the ground that this court has no jurisdiction

[13] *See* note 1, supra.

to review suspension orders of the ICC issued pursuant to 49 U.S.C.A. § 15(7). True, courts do not have jurisdiction to review ICC suspension orders. Congress has committed the decision to suspend or not to suspend proposed rates exclusively to the discretion of the Commission. *U.S.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963); K. Davis, ADMINISTRATIVE LAW TREATISE 966 (1970 Supp.). As a panel of this circuit noted:

> The Interstate Commerce Commission . . . is vested with power to suspend, at its discretion, for a period of seven months, rates filed with it pending hearing and decision on their lawfulness. 49 U.S.C. § 15(7). The existence of this power in the ICC, it has been held, evinces the deliberate decision of Congress to extinguish judicial power to grant any injunction which interferes with the Commission's discretionary decision to suspend rates filed with it at anytime before the Commission finally determines the lawfulness of the rates.

Texas v. *Seatrain International*, 518 F.2d 175 at 178 (CA5, 1975). But the rule of unreviewability presupposes an affirmative answer to a preliminary inquiry into whether the Commission has acted within the authority granted to it by § 15(7). A suit to enjoin a suspension order may be entertained if the complaint shows that the agency lacked the basic statutory authority to issue such an order. *Great Western Packers Express, Inc.* v. *U.S.*, 246 F.Supp. 151, 154 (D.Colo., 1965) (three-judge court); *Long Island Railroad Co.* v. *U.S.*, 193 F. Supp. 795, 800 (E.D.N.Y., 1961) (three-judge court).

Section 15(7) gives the ICC the power to suspend "any schedule stating a new individual or joint rate, fare, or

charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge" for a period not to exceed seven months, and to order an investigation and full hearings on those new charges. The above language has no plain meaning. The term "new" can refer to both changed and initial rates or only changed rates. The statutory history of the Mann-Elkins Act (1910), which added § 15(7) to the Interstate Commerce Act, yields little insight on whether the ICC is empowered to suspend initial rates since no one seems to have debated or even discussed this specific question. However, our examination of statutes modeled on § 15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates.

Section 15(7) has served as the prototype of other agency rate suspension provisions in the Interstate Commerce Act and in other regulatory acts as well. In many of these acts, when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language. In the Interstate Commerce Act itself, there are provisions modeled on 49 U.S.C.A. § 15(7) giving the ICC authority to suspend new rates, proposed by motor carriers, 49 U.S.C.A. § 316(g), by water carriers, 49 U.S.C.A. § 907(g)(i), and by freight forwarders, 49 U.S.C.A. § 1006(e). Each of these provisions contains a grandfather clause exempting certain initial rates from suspension. If initial rates were not covered there would have been no need for the grandfather clauses. Another example is 49 U.S.C.A. § 1482(g), which gives the Civil Aeronautics Board suspension powers similar to those granted to the ICC with one significant difference: it specifically provides that "[t]his subsection shall not apply to any initial tariff filed by any air carrier." Thus, we conclude that if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have

done so specifically, and that Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's § 15(7) suspension powers.

The conclusion that initial rates are covered by § 15(7) is consistent with the legislative policy underlying that section. Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

2. The suggested interim rates

The petitioners challenge the action of the Commission with respect to suggested interim rates. They point out that § 15(7) contains no provisions for establishing interim rates and that, in any event, rates can only be prescribed after full hearings. See 49 U.S.C.A. § 15(1). The Commission's position is that it has not actually fixed a rate but, in a situation of urgent national interest and as an incident of its power to suspend, it has given advance indication of the maximum rates with respect to which—if the carriers elect to file them—the Commission will not exercise its power to suspend.

The Commission Order refers to "interim rates," but baldly describing the issue as the power of the Commission to set interim rates is misleading. As we have held, the Commission had the power to unconditionally suspend the proposed tariffs, leaving the carriers without any tariffs but free to file new tariffs if they wished, which would be subject to new exercise of the Commission's power to suspend. The ICC chose not to ex-

ercise to its full limits the drastic but available power of unconditional suspension and instead announced that if petitioners would file interim tariffs at or below Commission-announced ceilings the Commission would not unconditionally suspend the tariffs originally filed.

The petitioners maintain that the § 15(7) power to suspend is an all or nothing instrument. We think not. The Commission may elect to exercise its power less than fully, or putting it another way, may partially waive the suspension power. We are guided by the Supreme Court's decision in *U.S.* v. *Chesapeake & Ohio Railroad Co.*, 426 U.S. 500, 96 S.Ct. 2318, 49 L.Ed.2d 14 (1976) ("*Chessie*"). In *Chessie* the ICC suspended a carrier-proposed tariff increase but at the same time authorized the railroads to refile, incorporating conditions which would assure that the additional revenue would be expended on capital improvements and deferred maintenance. The Supreme Court upheld the refiling provision as directly related to the ICC's suspension power. The Court noted that the ICC could simply suspend the originally proposed rates for the full statutory seven-month period but that instead "it pursued a more measured course and offered an alternative tailored far more precisely to the particular circumstances presented." 426 U.S. at 514, 96 S.Ct. at 2325, 49 L.Ed.2d at 23. *Chessie* establishes the right of the ICC to choose to exercise its suspension power to less than its outer limits in order to meet the needs of a particular situation. The ICC's authorization to file interim rates was the type of "more measured course" or partial waiver which the Supreme Court approved in *Chessie*.

Moss v. *CAB*, 430 F.2d 891 (C.A.D.C., 1970), relied on by the petitioners, is not to the contrary. In *Moss* the Court of Appeals for the District of Columbia held that the Civil Aeronautics Board (CAB) could not, after ex parte meetings with the air carriers, "suggest" a comprehensive rate formula that it would not suspend or investigate. *Moss* involved what for all intents and purposes was the establishment of permanent rates. By attempting to establish a permanent rate structure through its suspension power the CAB took actions which went beyond the strongest action it could have taken under its suspension power, i.e., suspending the proposed increases for 180 days. 49 U.S.C.A. § 1482(g). In essence what the CAB attempted to do in *Moss* was to waive a right it did not have. In contrast, the ICC's suggestion of interim rate ceilings in the present case is an action which is more restrained, or measured, than its right to unconditionally suspend the original tariff for a period of seven months. If in seven months the ICC has not completed its investigation, the carriers will be free to levy their originally filed charges subject to a refund order.

Also, in *Moss* the practical effect of the CAB's actions would have been to immunize the suggested permanent rate structure from judicial review.[14] In the present case the ICC has not sought to shield its final decision from judicial review. Instead the Commission has commenced hearings on the original rates proposed by the petitioners, and any eventual final order stemming from those hearings is subject to judicial scrutiny.

In a case involving initial rates, if the ICC could not couple its suspension order with a statement of maximum allowable interim ceilings, the Commission would be forced to allow initial rates to go into effect, even if facially outrageous, subject only to lengthy investigation and hearing procedures, or to watch a possibly vital public service close down for want of a rate schedule.

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[14] Judge Leventhal in his concurring opinion in *Continental Airlines, Inc.* v. *CAB*, 173 U.S.App.D.C. 1, 522 F.2d 107 at 131 (1975) (en banc), emphasized the evasion of judicial review as the key to *Moss*.

We doubt the Congress would have intended that the Commission face that Hobson's choice.

The use of interim rates as a condition to a suspension order is not unprecedented. In I & S Docket No. 8645, Orders (May 27, 1971, and June 29, 1971) the Commission ordered that increased lighterage charges proposed by the Penn Central Railroad be suspended but allowed the company to file interim rates containing additional charges not to exceed 50% of those initially proposed. The ICC's orders also required that Penn Central maintain an account from which refunds could be made to the extent that the proposed tariffs could not be justified to the Commission. In *Port of New York Authority* v. *U.S.*, 451 F.2d 783, 785-88 (CA2, 1971), the Second Circuit held that the Order was unreviewable and that federal courts lacked subject matter jurisdiction over an action challenging the Order.

We conclude that the ICC as corollary to its suspension power had the power to set out allowable rate ceilings for the seven-month period which, if filed, it would not suspend. Therefore, this aspect of its Order is not reviewable by this court.

3. The refund provisions

As a condition precedent to the interim rates which the Commission stated it would accept, the Commission required the carriers to establish refund provisions for use in the event that either the interim rates or the originally filed tariffs [15] or both should be found to be excessive.

With respect to this exercise of power for the seven-month period, like the power to suggest the interim rates

[15] As we noted previously, if the Commission does not complete its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect

themselves, we find this is a valid corollary to the suspension power, which we lack jurisdiction to review. *See Port of New York Authority* v. *U.S.*, *supra.* We are less certain of the Commission's power to require the carriers to establish refund provisions with respect to the originally filed rates. However, we view this exercise of power as corollary to the power to suspend. Thus, insofar as the Commission's order reaches beyond the seven-month period, we are guided by *Chessie*, where the condition upheld by the Supreme Court was permanent.[16]

4. Arbitrariness and confiscation

The petitioners assert that the Commission action was an abuse of discretion and that the interim rate ceilings are so grossly insufficient that they are confiscatory in violation of the Fifth Amendment. Restating, we understand these contentions to be that even if the Commission is authorized by § 15(7) to act with respect to the subject matter, its exercise of power departed from constitutional standards. Assuming that we can review the Commission Order through these constitutional entry points the record before us gives no basis upon which we can act.

All motions to intervene are GRANTED. All motions for stay, suspension, injunction and other forms of interlocutory relief are DENIED. The motion of the United States to dismiss the petitions for review is GRANTED.

[Judge Roney's dissent is set forth in pp. 41a-50a of this Appendix].

[16] Under § 15(7) the Commission may require carriers to keep records and make refunds after the seven-month period has expired. This expressly conferred authority is not what we rely upon—it relates to "a proposed increased rate or charge."

RONEY, Circuit Judge, dissenting:

I respectfully dissent. The thesis of the Commission is that it has the unreviewable authority to suspend the pipeline's initial rate filing and, as an adjunct of that authority, it has the power to fix an unreviewable interim rate for the seven month period. The idea that the Commission can set an unreviewable rate without following the statutory ratemaking procedures runs counter to the entire plan established by Congress in the Interstate Commerce Act.

This is ratemaking. We should not hide from that fact. The Commission candidly admits that it is making an interim rate. To suggest that the rate is "voluntary," that no rate has been set by the Commission because theoretically the pipeline companies could accept the seven month stay and not file for the interim rate, exalts form over substance in a way rarely countenanced by this Court. The Court, the Commission, the pipeline companies, and all parties to this proceeding know that an interim rate will have to be accepted by the respondents. Without a filed tariff, no oil can flow. No one has made the slightest suggestion in brief or oral argument that it would be either in the public or private interest for the transportation of this oil to be suspended for seven months while the Interstate Commerce Commission determines whether or not the proposed tariff is reasonable and just. *See* 43 U.S.C.A. § 1651 et seq. (Supp. 1977). We are given to understand that the rate here under consideration does not affect the price of oil at the delivery point, or the eventual price to the consuming public. Any transportation cost adjustment affects only the wellhead price of oil. Although there is almost complete identity between the affiliates which own the pipeline and those who receive the wellhead price, there are some others involved, and the royalty to the State of Alaska and property owners varies with the wellhead price.

The argument that this is not ratemaking because it is only an interim and not a permanent rate loses force in numbers. The pipeline companies claim the difference between what they should get and what they will get under the interim rate could amount to $340,000,000. This sum is undoubtedly greater than the amount at stake in many permanent rates subject to ICC approval.

Although *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963), and *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), are cited for the proposition that the grant or denial of a suspension order is not reviewable, they in fact only hold that a court has no authority at all to suspend a rate and that an ICC refusal to suspend is not reviewable under any statutory standard. They do not hold that a suspension order is unreviewable under constitutional due process standards. I would think that a suspension order in this case, where the lack of any tariff would effectively close down the Alaska Pipeline for seven months, and would eliminate any method of transporting the oil from the Alaska oil fields for that period of time, would be reviewable on a constitutional due process standard.

We are not confronted, however, with just a suspension order. The order before us is schizophrenic. It is both a suspension order *and* a ratemaking order.

This is a situation never previously confronted by the courts. In most situations, if a new rate is submitted to the ICC and the agency chooses to suspend it, this merely means that the carrier involved will continue to charge the rates already in existence. Thus the ICC need not take further action to ensure that the carrier can stay in business and collect charges that at least at one time were assumed to be reasonable, during the seven month period. Here, however, the Commission

was faced with a brand new entity. The Trans-Alaska Pipeline System had no preexisting rate schedule when it filed its "new" rate with the ICC. Thus, after deciding to suspend the filed rate, the ICC was faced with a situation which left no legal rate in effect for the seven month period. Unwilling to allow the pipeline to shut down, the Commission had to promulgate what is a "second" order, a ratemaking order.

Rate setting orders are clearly reviewable under the statute. Therefore I would not review the possible legality of just a suspension order here. I would accept this case for what it is: an attempt by the Commission to do two things, the first of which it would not do had it not the power to do the second. There is no indication in anything before us that the Commission would suspend the proposed tariff if it could not set an interim rate. Thus I would not reach the constitutional considerations that might demand review of a suspension order alone in this unique situation. There is no indication that the Commission would follow such a course. Its claimed authority to do so becomes merely the theoretical exercise of power onto which it hangs its ability to set an interim rate.

So I would assume without deciding that the Commission has the power to suspend the initial rate and go to the question of whether it can set the interim rate in the manner done here. If the interim rate cannot stand, I would send the case back to the Commission for whatever action it wishes to take within the confines of its legal authority. If it chooses to suspend without an interim rate, then on review a court could consider whether that action alone under the circumstances of this case can withstand the due process requirements of the Constitution. Or, if it chooses to arrive at some interim rate through procedures that have some resemblance to the ratemaking procedures which Congress had

required, that too could be reviewed. However, I do not think that in order to decide the case before us we need to make any definitive decision as to whether an initial rate suspension alone, under the facts of this case, would be legal, or whether the Commission can ever set interim rates in connection with a rate suspension. All I would now hold is that the Commission has no authority to do what it did here.

United States v. *Chesapeake & Ohio R.R.*, 426 U.S. 500, 96 S.Ct. 2318, 49 L.Ed.2d 14 (1976), is the only controlling authority relied upon for the proposition that interim ratemaking is a necessary power under the suspension authority. In deciding that interim ratemaking is unreviewable, the majority opinion completely overlooks the fact that the Supreme Court considered the "conditions" imposed on the proposed tariff there to be reviewable.

> In this Court, Chessie has argued that . . . the application of the Commission's action to it is arbitrary and capricious. . . . Since the District Court held that the Commission did not have the power to impose conditions on the refiling of the tariff, it did not address this question. Chessie, if it chooses, may raise the matter on remand in the District Court.

426 U.S. 515, 96 S.Ct. at 2326. To distinguish the point on the ground that in *Chessie*, the rate was permanent, must also distinguish the case beyond support for the proposition espoused in the case at bar.

This case is factually and legally different from *Port of New York Authority* v. *United States*, 451 F.2d 783 (2d Cir. 1971), relied upon by the majority. There the initial decision had been made to suspend the effective date of the proposed increase in tariffs. There was a tariff in effect after suspension, one which had already

been determined to be reasonable either through Commission action or lack of complaint. The suspension order was concededly within the sole discretion of the Commission, and *all* that was involved was timing. The Commission offered to let the carrier collect an interim increase, if it chose to do so. For two reasons that case is not helpful here.

First, in that case, there was a good faith suspension order of the rate increase which did not cut off services. Here there is *no* indication that the Commission would suspend the tariff and consequently cause a seven month delay in service. In fact, we are told that in oral argument before the Commission, the director of the Commission's Bureau of Investigation and Enforcement indicated the owners of the pipeline might be subject to civil or criminal penalties if they did not file for these "voluntary" interim rates. Such view would dispel any thought that the public interest required a rate suspension. This is pointed out not to suggest that a suspension order would be reviewable under the statutory public interest standard, but only to emphasize that the Commission has made no such decision upon which to hang the *Port of New York Authority* holding.

Second, the pipeline companies' choice is not whether to adhere to present rates for seven months, or accept an interim increase, as was the case in *Port of New York Authority*, but whether to do business at all, or accept an interim rate. This does not make acceptance or rejection of the interim rate the viable choice that was available in that case.

The interim rate being reviewable, the next question is whether it can stand. Even if the Commission is permitted some leeway, and allowance is made for the fact that it "pursued a more measured course and offered an alternative tailored far more precisely (than a simple suspension) to the particular circumstances presented," *Chessie*, 426 U.S. at 514, 96 S.Ct. at 2325, the manner of arriving at the interim rate was beyond the most liberal reading of its statutory authority.

Congress has set well-established limits on the ICC's power to make rates. First, historically, the ICC did not have ratemaking power. It could set aside a rate as being unreasonable, but the Supreme Court found no implied power to set a reasonable rate. *ICC* v. *Cincinnati, New Orleans & Texas Pacific Ry.*, 167 U.S. 479, 17 S.Ct. 896, 42 L.Ed. 243 (1897). Only nine years later did Congress amend the Act to give the ICC power to set maximum rates, Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 589, and not until 1920 was it given power to set minimum rates, Act of Feb. 28, 1920, ch. 91 § 418, 41 Stat. 484.

Second, the ICC has the power to set rates *only after* it has determined that a proposed rate is unreasonable. That principle has been reiterated in several cases which indicate that it is the carriers who have the right to propose initial rates. *ICC* v. *Louisville & Nashville R. R.*, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431 (1913) ("Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order." 227 U.S. at 92, 33 S.Ct. at 187). *See also New York* v. *United States*, 331 U.S. 284, 67 S.Ct. 1207, 91 L.Ed. 1492 (1947); *United States* v. *Illinois Central R. R.*, 263 U.S. 515, 522, 44 S.Ct. 189, 68 L.Ed. 417 (1923); *Southern Pacific Co.* v. *ICC*, 219 U.S. 433, 31 S.Ct. 288, 55 L.Ed. 283 (1911); *ICC* v. *Chicago Great Western Ry.*, 209 U.S. 108, 118-119, 28 S.Ct. 493, 52 L.Ed. 705 (1908).

Third, a proposed rate can be found unreasonable *only after* a full hearing. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262, 52 S.Ct. 146, 150, 76 L.Ed. 273 (1932) ("The legal standards governing the action of the Commission in determining the reasonableness of the rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement.") The courts have consistently held that a finding by the ICC of unreasonableness of the rate proposed by the carrier must be supported by substantial evidence on the record as a whole. *Atchison, Topeka & Santa Fe Ry. Wichita Board of Trade*, 412 U.S. 800, 806, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271, 46 S.Ct. 500, 70 L.Ed. 941 (1926); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562, 39 S.Ct. 375, 63 L.Ed. 772 (1919); *Archer Daniels Midland Co.* v. *United States*, 301 F.Supp. 328 (D. Minn. 1969) (3-judge court); *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 282 F.Supp. 430, 434 (D. Kan. 1968) (3-judge court).

Last, the ICC can establish a rate only after a *full evidentiary hearing. Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262, 52 S.Ct. 146, 76 L.Ed. 273 (1932); *ICC* v. *Louisville & Nashville R. R.*, 227 U.S. 88, 93, 33 S.Ct. 185, 57 L.Ed. 431 (1913). That hearing requirement is not satisfied by the "brief and informal hearing" which accompanies a suspension order. *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 672, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963). The case for strict enforcement of the hearing requirement is particularly strong because this rate applies to so few companies, and the administrative inconvenience of multiple parties which sometimes justifies lowered procedural standards is not present. *Compare Londoner* v. *Denver*, 210 U.S. 373

28 S.Ct. 708, 52 L.Ed. 1103 (1908) (individual property assessment without hearing invalid) with *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915) (city-wide revaluation does not require individual adjudication). Even in the multi-party rate cases administrative hearings have withstood attack only when the agency granted adequate notice and opportunity to comment both on the original rate proposal and on the comments made by others. *See Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1074-1076 (5th Cir. 1975), *cert. denied sub nom., California Co.* v. *FPC*, 426 U.S. 941, 96 S.Ct. 2660, 49 L.Ed.2d 394 (1976).

In this case where is the finding of unreasonableness of the proposed rate on an evidentiary record, and where is the record to support the interim rate? The Commission readily admits that it cannot support either finding by record evidence.

But procedural unfairness is only the beginning of the arbitrariness in this case. The real difficulty, and the problem that makes the procedural shortcuts so detrimental to the petitioners, is that Congress through the Act has provided a reasonable way to protect *all* parties in this proceeding against the effect of error in the proposed rate, but the Commission has, without offer of justification, ignored it in the proposed interim tariff. If the rate is determined to be too high, the carriers may be forced to refund, with interest, 49 U.S.C.A. § 15(7) (Supp. 1977), or pay back as damages, with costs and attorneys' fees, 49 U.S.C.A. § 8, an overcharge collected prior to rate determination. In other words, the parties overcharged can be made whole. If the interim rate is too low, however, the ICC program provides no means whatsoever for the pipeline to recover the difference between what it was required by the Government to charge, and what that same Government later decides would

have been a reasonable rate. To have a way to protect all interests, and not take it, and subject one party to the possibility of irreparable loss, is impermissible under even the most deferential standard of judicial review.

The complainants argue that a system of refunds would produce justice at the price of delay. Even justice delayed, however, is preferable to justice forever denied. At oral argument, Commission's counsel suggested no harm had been done because the interim rate is the highest rate that could reasonably be established for the pipeline. That statement constitutes a gross prejudgment of what the ICC will do, and overlooks entirely the reviewable nature of the Commission's ultimate ratemaking action. Without a sufficient record to support a finding of anything at all, and with serious questions about the rate of return, the treatment of inflation, and allowances for depreciation, counsel would have this Court predict what Commissioners, who may not be in office now, will do on the evidence presented them, and what a court of judges, who may not be in office now, will do on review of whatever those Commissioners do.

Nor can this Court sustain the interim rate by obeisance to the expertise of the Commission. Only after a full hearing upon complaint made does the law give weight or significance to the opinion of the Commission. *Atlantic Coast Line R. R.* v. *ICC*, 194 F. 449 (Commerce Ct. 1911). The expertise of the Commission can only be relied upon after it has exercised its expert judgment on the record before it. *See* Pedersen, *Formal Records & Informal Rulemaking*, 85 Yale L.J. 38 (1975).

Hence I would hold that the Commission had no authority to set in the way it did the interim rate which was forced upon the carriers. I would set aside that proposed interim rate for these reasons: *first*, the Commission did not even attempt to follow congressionally man-

dated procedures for setting rates; *second*, without some specific finding of unreasonableness in the proposed rate, it appears arbitrary not to follow the statutory plan by which all parties could be protected against any eventual rate determination, and to follow a course which would cause irreparable damage to the pipelines if their position is eventually sustained; *third*, the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative risks of equity capital, a rate arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor.

I would set aside the Commission's Order of June 28, 1977 and remand the case to the Commission for further consideration consistent with its statutory authority.

Judgment, Issued as Mandate September 8, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Mobil Alaska Pipeline Company, BP Pipelines Inc., Exxon Pipeline Company and Arco Pipeline Company for review of an order of the Interstate Commerce Commission, and was heard on the motion papers on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petitions for review of an order of the Interstate Commerce Commission in this cause be, and the same are hereby dismissed. All motions to intervene are GRANTED. All motions for stay, suspension, injunction and other forms of interlocutory relief are DENIED.

July 29, 1977

Issued as Mandate: Sept. 8, 1977

A true copy

Teste: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit

/s/ CLARE F. SACHS
Sept. 8, 1977

Order of Court of Appeals Denying Motions of Exxon Pipeline Co. to Stay Mandate and Stay Order of Inter-State Commerce Commission, September 8, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

Before BROWN, Chief Judge, and RONEY, Circuit Judge*.

BY THE COURT:

Exxon Pipeline Company has moved for a stay of the mandate of this Court pending its application for a writ of certiorari to the Supreme Court for review of our decision of July 29, 1977 in Mobil Alaska Pipeline Co. v. United States, etc. [Nos. 77-2392, 77-2412, 77-2421 and 77-2437 at 5208]. Such a stay is unnecessary for timely petition for certiorari. Therefore, it is ordered that Exxon's motion for a stay of mandate is DENIED.

Exxon additionally has moved for a stay of the June 28, 1977 Interstate Commerce Commission Order pending application to the Supreme Court for a writ of certiorari for review of our July 29, 1977 decision. This motion seeks essentially the same relief previously sought before this panel as to which this Court has ruled on the merits. Because of the action of the panel, and for the reasons stated in the majority opinion, Exxon's motion for stay of the ICC order is also DENIED.

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* Judge Godbold, a member of the panel, being absent from the United States, did not participate in this Order.

Order of Court of Appeals Denying Petition of BP Pipelines Inc. for Rehearing, Sept. 8, 1977.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted In Printing]

Before BROWN, Chief Judge, and RONEY, Circuit Judge*.

BY THE COURT:

BP Pipelines Inc. has petitioned for rehearing of our July 29, 1977 decision in Mobil Alaska Pipeline Co. v. United States, etc. [Nos. 77-2392, 77-2412, 77-2421 and 77-2437 at 5208]. We believe that the petition presents substantially nothing that the panel did not pass on in its prior decision. In view of the severe time problems involved in the operation of the Trans Alaska Pipeline and the parties' need to expedite Supreme Court review, the Court is of the opinion that nothing further would be accomplished by rehearing.

Therefore, to enable the parties to seek review before the Supreme Court without further delay, it is ordered that BP's Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is DENIED.

* Judge Godbold, a member of the panel, being absent from the United States, did not participate in this Order.

Order of Interstate Commerce Commission Denying Petitions for Reconsideration, etc., Sept. 27, 1977.

INTERSTATE COMMERCE COMMISSION

ORDER

INVESTIGATION AND SUSPENSION
DOCKET NO. 9164[1]

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

By orders of June 28, 1977,[2] and July 19, 1977,[3] we instituted investigations into the lawfulness of initial tariff rates filed by eight pipeline companies for transportation of crude petroleum over the Trans Alaska Pipeline System. We also suspended the operation of those rates for periods of seven months and authorized the filing of lower interim rates for use during the suspension period. Petitions for reconsideration of various aspects of our orders have been filed both by the pipeline companies and by parties challenging their tariffs.[4]

On petition, one or more of the carriers contend: (1) that higher interim rates should be authorized on the basis that traffic volume during the suspension period will aver-

1. Embraces Investigation and Suspension Docket No. 9164 (Sub-No. 1), Trans Alaska Pipeline System (Rate Filings); Docket No. 36611, Trans Alaska Pipeline System (Rules and Regulations); and Docket No. 36611 (Sub-No. 1), Trans Alaska Pipeline System (Rules and Regulations).

2. I. & S. No. 9164, affecting Amerada Hess Pipeline Corporation, Arco Pipe Line Company, BP Pipelines, Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Corporation, Sohio Pipe Line Company, and Union Alaska Pipeline Company.

3. I. & S. No. 9164 (Sub-No. 1), affecting Phillips Alaska Pipeline Corporation.

4. The petitions and replies to them are identified in the appendix to this order.

age less than the 1.2 million barrels a day assumed in the Commission's orders; (2) that the yearly charges recognized for removal and restoration costs should be increased to account for inflation and taxes; (3) that a greater percentage return on valuation should be allowed; and (4) that the suspension periods for Phillips and Amerada Hess should be modified. These contentions will be discussed individually.

In our order of June 28th, we assumed that the carriers' normal traffic volume, or "throughput," for the beginning years would be 1.2 million barrels a day. We used this assumption in converting the carriers' total costs to per-barrels costs, for the purpose of finding suitable interim per-barrel rates. The carriers now seek a decrease in the assumed throughput, which would result in higher costs per barrel, and thus, higher interim rates.

The carriers do not deny that 1.2 million barrels is the amount that they reported to the Commission as their expected normal daily throughput (prior to any future expansion of pipeline capacity). However, they now take the position that, in authorizing an interim rate for a seven-month suspension period, the Commission should consider only the traffic volume expected during that period. They note that throughput during the suspension period will be lower than normal volume for two reasons: (1) there is an expected lower-volume startup period, variously estimated to last from several weeks to as long as four months, and (2) the occurrence of a fire at Pump Station 8 has imposed a substantial additional delay on the attainment of normal traffic volume.

We find insufficient basis in the petitions for modifying the throughput assumption upon which the interim rates were computed. At the time of our previous orders, we

were indeed aware that there would be a startup period in which throughput would be below normal. Nevertheless, we did not consider it suitable to use the throughput level of a short initial period, such as the suspension period, as the basis for finding per barrel costs. The interim rates were intended to be preliminary estimates of maximum lawful rates for the services proposed in the tariff. Therefore, the cost data and the throughput assumption that we used were related to expected typical conditions of pipeline operation. The petitions shown no reason to conclude that the throughput figure used was erroneous on the basis of the data previously before the Commission.

Nor do we believe that the carriers' assertion of changed circumstances resulting from the pump station fire warrants a modification of the throughput assumption. The carriers contend that this accident will have a severe and rather long-lasting effect on throughput. In some of the petitions, it is estimated that throughput will not exceed 800,000 barrels a day during the suspension period, and may be much less. Phillips and Exxon report an estimate that daily volume will range from 617,000 barrels in August 1977 to 690,000 barrels in December 1977; Phillips further asserts that the 690,000 barrel level may not be exceeded until the third quarter of 1978.

There are two reasons why these assertions do not warrant a change in our throughput assumption. First, the risk of setbacks such as the pump station fire was taken into account when we chose the rate of return on valuation to be allowed in computing interim rates. Second, the carriers have provided no data and little explanation to support their projections of lower throughput. We do not know, for example, how much daily throughput capacity was lost specifically from the destruction of pump station

8; when pump station 8 is expected to be restored to service; why this amount of time would be required; what other factors enter into the carriers' throughput estimates; what means other than the rebuilding of pump station 8 are available to increase the throughput; whether such means will be employed, and to what effect.

In short, our prior orders were made in recognition both of an expected initial period of low throughput and of the risk of operating problems. The information subsequently submitted by the carriers is insufficient to establish circumstances very different from what we previously contemplated. Therefore, the request for use of a different throughput assumption in computing authorized interim rates will be denied.

Turning to the carriers' other contentions, the question of the appropriate allowance for removal costs was fully considered in our previous orders, as was the question of the appropriate rate of return standard for use at the suspension level. No warrant for modification of those conclusions has been demonstrated.

Amerada Hess and Phillips each seek modification of the termination dates of their suspension periods, which are later than the termination dates for the other six carriers. The tariff of Amerada Hess had a proposed effective date one day later than the others. Its tariff, like the others, was suspended for a period of seven calendar months. However, as a result of the differing lengths of the included calendar months, its suspension period extends two days beyond the others. It seeks to have its suspension period shortened by one day, to have the same number of days' duration as the others.

Phillips' tariff was filed with an effective date 20 days later than the others, and therefore its suspension period

expires 20 days later. It seeks to have its suspension period shortened to expire on the same day as the others.

These requests for shortened suspension periods will be denied. The statutory seven-month suspension period was established by Congress for the protection of the public. Under present circumstances, we do not believe that the public should be deprived of that protection by the use of a shorter suspension period than the law allows. As an incidental matter, we note that, in the June 28th order, the omission of the words "and including" from the description of the last day of the suspension period for Amerada Hess was inadvertent, and will be corrected in this order.

In addition to respondents' petitions for reconsideration, Phillips also filed a request for stay of the suspension of its tariff rate. In this pleading it argues that a refund provision without suspension would avoid harm to it while adequately protecting shippers. Arguments of this nature were fully considered in the Commission's previous orders, and no reason for modification of those conclusions has been shown. The request for stay will be denied.

It is contended by the protestants in their petitions (1) that the Commission should extend the duration of its suspension period beyond the specified seven months to the full period of the investigation, or seek legislative authority to do so; (2) that the suspension periods should be calculated from the date of readiness to provide for-hire service rather than from the effective dates of the tariffs; (3) that the authorized interim rates should be reduced on the basis of different conclusions regarding valuation, tax allowances, and depreciation charges; and (4) that refunds should be provided for at a 10 percent rate rather than at the lower rate resulting from the application of section 15 (8)(e) of the Interstate Commerce Act.

We find no basis in protestants' petitions for modification of the conclusions in our orders. The seven-month duration of the suspension period is clearly specified in section 15 (7) of the act, and is an expression of a carefully considered Congressional policy. Similarly, the date of commencement of the suspension period is clearly indicated in section 15 (7) as being the proposed effective date of the tariff. The proper standards of cost and investment for the authorized interim rate were fully considered in our previous orders, and no reason for modification of those conclusions has been demonstrated. Finally, we do not agree that refunds should bear interest at a rate equal to the authorized rate of return on valuation, where there is no similarity in the risk characteristics of the respective uses of funds. Protestants' petitions, accordingly, will be denied.

Finally, in its "response" to petitions for reconsideration, Sohio makes the request, not previously made by any party in these proceedings, that interim rates for all of the carriers be authorized at the same level. Such a request for affirmative relief in a reply pleading is neither authorized by our General Rules of Practice nor fair to the other parties. Moreover, the requested action would result in different standards of profitability being applied to different carriers, without demonstrated necessity or justification. The request is without merit, and will be denied.

It is ordered, That our order of June 28, 1977, in Investigation and Suspension Docket No. 9164 is clarified and corrected by the insertion of the words "and including" after the words "suspended to" in the next-to-last line of the first ordering paragraph.

It is further ordered, That the petitions for reconsideration and other requests for affirmative relief contained in

the pleadings described in the appendix to this order are denied.

Decided September 20, 1977.

H. G. Homme, Jr.
Acting Secretary

By the Commission.

(SEAL)

Commissioner Murphy, whom Commissioners Stafford and Macfarland join, dissenting in part:

In light of circumstances presented on petition, including the reduction in the estimated volume of oil moving per day, I believe that respondents should be allowed an increase of 42 cents per barrel in the interim levels. The interests of parties in opposition are adequately protected by the refund provisions applying to the interim level of rates.

With respect to the request by some respondents that the suspension period be altered, it should be pointed out that the Commission can establish a shorter period where appropriate. As a matter of convenience, an identical expiration date of the suspension period, namely January 29, 1978, would be most appropriate, again giving due consideration to the fact that the parties in opposition are protected by other refund provisions.

I would deny the petitions in all other respects.

ICC Order Denying Petitions for Reconsideration.

I. & S. No. 9164

APPENDIX

Description of Petitions, Replies, and Other Pleadings which are the Subject of the Present Order

Petitions

FILED:

July 8	Petition of Exxon Pipeline Company for Reconsideration
July 22	Supplement to Petition of Exxon Pipeline Company for Reconsideration
July 25	Petition of the Bureau of Investigation and Enforcement for Reconsideration and Statutory Clarification of the Commission's Suspension Orders
July 25	Petition of ARCO Pipeline Company for Reconsideration
July 27	Petition of Union Alaska Pipeline Company for Administrative Review
July 27	Petition of Amerada Hess Pipeline Corporation for Reconsideration or Clarification
July 27	Petition of Mobil Alaska Pipeline Company for Reconsideration
July 28	Petition of Phillips Alaska Pipeline Corporation for Reconsideration and Revision
July 28	Petition of BP Pipelines Inc. for Reconsideration and for Permission to File a Revised Rate
July 28	Petition of the State of Alaska for Reconsideration

Replies

July 18	Reply of the Arctic Slope Regional Corporation to the Petition of Exxon Pipeline Company for Reconsideration and to Application for the Stay of the Order Served June 28, 1977
July 19	Reply of the United States Department of Justice to the Petition of Exxon Pipeline Company for Reconsideration

ICC Order Denying Petitions for Reconsideration.

FILED:

July 28	Reply of the Bureau of Investigation and Enforcement to Petitions for Reconsideration filed by Exxon Pipeline Company and ARCO Pipeline Company
August 15	Joint Response to Petition of the Bureau of Investigation and Enforcement to extend the TAPS Suspension Periods
August 15	Joint Response to Petition of the State of Alaska for Reconsideration
August 16	Response of Sohio Pipeline Company to Petitions for Reconsideration
August 17	Consolidated Reply of the United States Department of Justice to Petitions of the Respondents for Reconsideration of the Commission's Orders of June 28, 1977 and July 18, 1977
July 28	Request for Stay of Suspension Order Dated July 19, 1977 (filed by Phillips Alaska Pipeline Corporation)
August 10	Opposition of the Bureau of Investigation and Enforcement to Phillip's Request for Stay of the I&S Order

Order of the Supreme Court Granting Application for Stay of ICC Order, October 20, 1977.

THURSDAY, OCTOBER 20, 1977
ORDER IN PENDING CASES

77-452, A-278 } MOBIL ALASKA PIPELINE CO. v. UNITED STATES

77-457, A-280 } EXXON PIPELINE CO. v. UNITED STATES

77-551, A-319 } BP PIPELINES, INC. v. UNITED STATES

The applications for stay, presented to Mr. Justice Powell and by him referred to the Court, are granted. The order of the Interstate Commerce Commission served June 28, 1977, in its Investigation and Suspension Docket No. 9164, Trans-Alaska Pipeline System (Rate Filings) is hereby stayed pending final disposition of the petitions for certiorari by this Court. The stays are conditioned upon applicants'-petitioners' agreement to keep account of the amounts collected under the proposed rates, as that term is used in the order in this matter issued by the Interstate Commerce Commission on June 28, 1977, and their agreement to refund any portion of the amounts collected under such rates by virtue of the stay which it is ultimately determined that they were not lawfully entitled to collect. The parties shall submit a proposed order embodying this undertaking to the Clerk of this Court within five days.

Mr. Justice Stewart and Mr. Justice Powell took no part in the consideration or decision of this order.

s/WEB

Order of the Supreme Court Further Effectuating Stay of ICC Order, November 14, 1977.

SUPREME COURT OF THE UNITED STATES

MOBIL ALASKA PIPELINE COMPANY v.
UNITED STATES ET AL.;
EXXON PIPELINE COMPANY v. UNITED STATES ET AL.;
BP PIPELINE, INC. v. UNITED STATES ET AL.; and
ARCO PIPELINE COMPANY v. UNITED STATES ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 77-452, 77-457, 77-551, 77-602, A-278, A-280, A-319, and A-376.

Decided November 14, 1977

On October 20, 1977, this Court stayed the order of the Interstate Commerce Commission served June 28, 1977, in its Investigation and Suspension Docket No. 9164, Trans-Alaska Pipeline System (Rate Filings) pending final disposition of the petitions for a writ of certiorari by the Court. To further effectuate that order, it is hereby ordered:

1. During the period the stay is in effect, commencing at 3 p. m. E. D. T., October 20, 1977, the following pipeline companies may collect their respective rates set forth in the tariffs that were suspended by the Interstate Commerce Commission in its order of June 28, 1977:

Amerada Hess Pipeline Corporation
Arco Pipeline Company
BP Pipeline Company
Mobil Alaska Pipeline Company
Sohio Pipe Line Company
Exxon Pipeline Company
Union Alaska Pipeline Company

2. The Federal Energy Regulatory Commission may proceed with its investigation of the rates set forth in said tariffs (FERC Docket No. (R78-1)) and in connection with that investigation may enter any appropriate orders not inconsistent with either this order or this Court's order of October 20, 1977.

3. During the period the stay is in effect, the pipeline companies shall keep account of all sums collected under the terms of said tariffs by virtue of the stay entered by this Court.

4. In the event certiorari is denied or it is otherwise ultimately determined that said pipeline companies were not lawfully entitled to collect a portion of the rates so collected, the pipeline companies shall refund such portion of said rates, with interest computed in accordance with section 15(8)(e) of the Interstate Commerce Act (49 U. S. C. § 15(8)(e)), to the persons entitled thereto without further order of this Court.

MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this order.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHAL joins, dissenting.

I initially joined in granting a stay in these cases. Upon further consideration, however, I am convinced that our stay was improvidently and precipitately issued and that it should now be dissolved.

Petitioners will be able to collect approximately $1.5 million per day by virtue of our stay that would not be collected were the suspension order of the Interstate Commerce Commission—which is the subject of petitions for certiorari

in this case[1]—to remain in effect. Because of the enormous sums of money that will be collected under our stay, over $100 million by January 28, 1978, when the suspension order of the ICC ends by its terms, the Court should be very clear before continuing this stay that it is really needed to protect petitioners and, more importantly, that the provisions of the stay adequately protect the interests of anyone who may be affected by this litigation. On the pleadings so far before us, I am not convinced that the Court is in a position to act with any such conviction.

First, with respect to the need for the stay, it is important to recognize that each petitioner comes before his Court in a dual capacity: Each is both a part-owner of the Trans Alaska Pipeline *and* a shipper of oil over the pipeline. Therefore some amounts which a petitioner would be prevented from collecting under the suspension order would immediately be recouped as extra profit to that petitioner in its capacity as a shipper. This is not to suggest that the gains would offset the losses with any precision, but only that the net losses may be sufficiently small that extraordinary equitable relief would not be appropriate.

My greater concern, however, is that the form of our stay may not adequately protect the ultimate consumers of oil shipped over the pipeline nor the interests of shippers or holders of royalty interests in the oil at Prudhoe Bay. Although the petitioners aver that the "landed price" of oil in the United States will not be affected by our stay and therefore that consumers of Alaskan oil will not face higher prices because of our order. I am not prepared to accept these unexplained statements on the record presently before us. Nor do I think the interest which petitioners are

1. For a discussion of the background of this litigation, see *Mobil Alaska Pipeline Co.* v. *United States*,——F.2d——(CA5 Nos. 77-2392, 77-2412, 77-2437. July 20, 1977).

Order of the Supreme Court Further Effectuating Stay of ICC Order.

today ordered to pay on any amounts ultimately ordered refunded is sufficient to reimburse shippers and royalty holders for the costs they may incur as a consequence of our stay. The only information we have as to what those costs may be is the statement of the Arctic Slope Regional Corporation[2] that it will have to borrow amounts equal to the royalties it would have had but for our stay at an estimated interest of 10%. Nonetheless, the Court today sets the interest to be paid on amounts refunded at the rate prescribed by 49 U.S.C.A. § 15(8)(e) (Supp. 1977), which applies only the railroad tariffs and is today somewhere below 7%.[3] Indeed, in adopting this rate, the Court today rejects what is to me the much more reasonable suggestion of the Solicitor General that the interest be set at 9%, which is the rate prescribed by the Federal Power Commission for tariff refunds from natural gas pipelines.[4]

For the reasons stated above, I would vacate the stay ordered by this Court on October 20, 1977, and order proceedings on the petitions for certiorari to be expedited. Barring this, I would have entered the form of stay order suggested by the Solictor General.

MR. JUSTICE BLACKMUN, dissenting.

I, too, conclude that the Court's stay was improvident. I agree with the conclusions reached by MR. JUSTICE BRENNAN and would vacate the stay issued by this Court on October 20, would accelerate consideration of the petitions for certiorari, and would follow the suggestions of the Solicitor General as to the rate of interest.

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2. Arctic Slope is the representative of the Inupiat Eskimos who have a claim to be paid 2% of the wellhead value of Alaskan crude oil up to a total of $500 million as consideration for their surrender of aboriginal land claims in the Prudhoe Bay area.

3. Section 15(8)(e) sets the rate of interest at "a rate which is equal to the average yield . . . of marketable securities of the United States which have a duration of 90 days."

4. See 18 CFR § 154.67(c)(2) (1977).

Order of Supreme Court Granting Petitions For Writs of Certiorari, November 28, 1977.

SUPREME COURT OF THE UNITED STATES

No. 77-452

MOBIL ALASKA PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES, *et al.*

ORDER ALLOWING CERTIORARI. Filed November 28, 1977.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 77-457, 77-551 and 77-602 and a total of one hour is allotted for oral argument.

Mr. Justice Stewart, Mr. Justice Blackmun and Mr. Justice Powell took no part in the consideration or decision of this case.

Supreme Court, U. S.
FILED
JAN 12 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Vol. III.—EXHIBITS

In The

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. and ARCO PIPE LINE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED SEPTEMBER 22, OCTOBER 12, OCTOBER 25, 1977

CERTIORARI GRANTED NOVEMBER 28, 1977

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7/11/77	Flg. Petitioner's Motion to Stay, Restrain and Suspend Order of I.C.C.—*BP Pipelines*
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7/15/77 Flg. Memorandum of U.S. in Support of Their Motion to Dismiss, also fld. in Nos. 77-2412, 77-2421, and 77-2437—*all cases*

7/18/77 Flg. Mobil Alaska's Reply Memorandum in Support of Application for Temporary Restraining Order and Interlocutory Injunction and Response to Motion to Dismiss. (Copies were mailed directly to Judges' home stations.)—*Mobil Alaska*

7/18/77 Flg. Motion of Amerada Hess for Entry of Appearance as a Party—*Mobil Alaska*

7/18/77 Flg. Exxon's Reply to Motion of USA for Consolidation and Motion to Dismiss (Copies sent directly to Judges' home stations.)—*Exxon Pipeline*

7/19/77 Flg. Reply of ICC in Opposition to ARCO's Application for Interlocutory Injunction, and Exxon's Motion for Expedited Consideration (Copies sent directly to judges' home stations.)—*ARCO Pipe Line and Exxon Pipeline*

7/19/77 Flg. State of Alaska's Supplemental Memorandum in Opposition to Application for TRO and Interlocutory Injunction and in Support of Motion to Dismiss filed by Respondent U.S. (Copies sent directly to home stations.)—*all cases*

7/19/77 Minute Entry: Oral arguments were held in Houston, Texas today on Cases 77-2392, 77-2412, 77-2421 and 77-2437 on the motion to dismiss, temporary restraining order and injunctive relief. The Court granted from the bench the motion to consolidate these cases as well as the motions of all parties to intervene. The motion to dismiss and temporary restraining order and injunctive relief motions were taken with the case. The Panel consisted of Judges Brown, Godbold and Roney. Arguing for Petitioners were: 1) Andrew J. Kilcarr (Mobil Alaska); 2) Richard

DATE

J. Flynn (Exxon); 3) Marvin Schwartz (BP) and 4) Robert Jordan who handled the rebuttal (for ARCO). Arguing for Respondents were: 1) Charles H. White, Jr. (ICC); 2) Donald A. Kaplan (D. of Justice); 3) Avrum Gross (Atty. Gen., Alaska) and 3) Yale Lewis (Arctic Slope)—*Mobil Alaska*

7/22/77 Flg. Suppl. Memorandum of State of Alaska in Opposition to Memorandum in Support of Petition fld. by Intervenor, Amerada Hess Pipeline Corp.—*all cases*

7/25/77 Flg. Motion of Union Alaska Pipeline Company to Appear as a Party—*Mobil Alaska and Exxon Pipeline*

7/29/77 Opinion of Court of Appeals dismissing cases: all motions to intervene granted; all motions for stay, suspension, injunction, etc. denied—*all cases*

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8/29/77 Flg. Memorandum of Respondent, U.S.A., in Opposition to Motion for Stay—*Exxon Pipeline*

9/ 1/77 Flg. Response of State of Alaska in Opposition to Motions of Exxon Pipeline Co. for Stay of Mandate and Stay of Order of I.C.C.—*Exxon Pipeline*

9/ 8/77 Flg. Order Denying Exxon's Motion for Stay of Mandate and Denying Exxon's Motion for Stay of ICC's order. (JRB/PHR)—*Exxon Pipeline*

9/ 8/77 Flg. Order Denying BP's Petition for Rehearing and Denying Petition for Rehearing en banc. (JRB/PHR)—*BP Pipelines*

Date	
9/ 8/77	Judgment Issued as Mandate—*all cases*
9/26/77	Notice of Flg. of Cert. Pet. on 9-22-77—*Mobil Alaska and Exxon Pipeline*
10/17/77	Notice of Flg. of Cert. Pet. on 10-12-77—*BP Pipelines*
10/26/77	Flg. Copy of Supreme Ct. Order staying order of I.C.C. pending final disposition of petition for certiorari in Supreme Ct.—*Mobil Alaska*
11/ 1/77	Notice of Flg. of Cert. Pet. on 10-25-77—*ARCO Pipe Line*
12/ 2/77	Order of S.C. granted [certiorari] 11-28-77—*all cases*

INTERSTATE COMMERCE COMMISSION

Docket 36611

Title/Substance of Document

6/2/77 1. NOTICE: To Trans-Alaska Pipeline System owners. Requesting prompt filing of data concerning proposed rate levels and each company is asked to send a copy of its data submittal simultaneously to the State of Alaska.
[By] ROBERT L. OSWALD, Secretary (1 p.)

6/8/77 2. NOTICE: Requesting that any protests to the tariffs be filed by 6/13/77, and that replies to protests be submitted by 6/15/77.
[By] ROBERT L. OSWALD, Secretary (2 pp.)

6/13/77 3. SUPPLEMENTAL NOTICE: Advising the effective dates of tariffs filed by Sohio Pipe Line Company, BP Pipelines, Inc., and Mobil Alaska Pipeline Company have been postponed from 6/20/77 to 6/30/77, in view of these postponements, the filing dates set forth in the notice in item next above are modified, and that notice should be disregarded and requesting that protests to all of the tariffs now on file be submitted 6/15/77, and replies by 6/22/77. Parties desiring to participate in

Date

oral argument shall comply with rule 98 of the Commission's General Rules of Practice, by submitting a request for an allotment of time on or before 6/17/77.
[By] H. G. HOMME, JR., Acting Secretary (2 pp.)

6/14/77 4. PETITION: In aid of ICC Jurisdiction.
[By] STATE OF ALASKA
(by J. M. Cleary) (6 pp.)

6/15/77 5. REPLY: To the petition in item next above.
[By] SOHIO PIPE LINE COMPANY (4 pp.)

6/15/77 6. PROTEST/COMPLAINT
[By] STATE OF ALASKA
(by J. M. Cleary) (99 pp.)

6/15/77 7. PROTEST: And PETITION for Suspension and Investigation.
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT, I.C.C.
(by E. D. Greenberg) (104 pp.)

6/15/77 8. PRELIMINARY STATEMENT
[By] TERRY F. LENZNER (representing Alaska Pipeline Commission) (267 pp.)

6/15/77 9. PETITION: AND COMPLAINT for suspension of initial rates and rules for transportation of petroleum via the Trans Alaska Pipeline System (TAPS) from Prudhoe Bay, Alaska, to Valdez, Alaska, and for an investigation thereof.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (30 pp.)

6/15/77 10. PROTEST: And PETITION for suspension.
[By] UNITED STATES DEPARTMENT OF JUSTICE
(by P. J. Tomao) (29 pp.)

6/15/77 11. LETTER: Transmitting data, they believe, that the rate of earnings estimates will be produced by their initial tariff will not exceed any lawful criterion of the reasonableness of such earnings.
[By] SOHIO PIPE LINE COMPANY
(by J. T. Boltacz) (8 pp.)

BEST COPY AVAILABLE

Date

6/15/77 12. LETTER: Transmitting the basis for the computation of their tariff rate issued on 6/15/77.
[By] UNION ALASKA PIPELINE COMPANY
(by D. M. Schwartz) (4 pp.)

6/16/77 13. SUPPLEMENTAL PETITION: And COMPLAINT to the petition and complaint in item #13 above.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (4 pp.)

6/17/77 14. ORDER: That the petition in item #4 above is *denied*.
[By] THE COMMISSION (Commissioners Murphy, Hardin, and Christian not participating) (1 p.)

6/17/77 15. ORDER: That an investigation is instituted; that the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said schedules under the IC Act; and that the carriers parties to the schedules are made respondents to this proceeding.
[By] THE COMMISSION (Commissioners Murphy, Hardin, and Christian not participating) (2 pp.)

[Requests for oral argument time omitted]

6/17/77 21. Response to the notice in item #1 above.
[By] BP PIPELINES, INC.
(by D. A. Lucas) (23 pp.)

6/20/77 22. PROTEST: And PETITION for suspension and investigation.
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT
(by E. D. Greenberg) (3 pp.)

6/21/77 23. LETTER: Transmitting a computation of the elements making up the determination of their proposed rate level.
[By] AMERADA HESS PIPELINE CORPORATION
(by A. S. Tabor, Jr.) (10 pp.)

6/22/77 24. NOTICE: Advising time allotments for Pipeline Companies and the protestants.
[By] H. G. HOMME, JR., Acting Secretary (2 pp.)

Date

6/22/77 25. REPLY: To the protests in item #'s 6, 7, 9, 10 and 13 above.
[By] MOBIL ALASKA PIPELINE COMPANY
(by A. J. Kilcarr) (67 pp.)

6/22/77 26. REPLY: To the protests in item #'s 6, 9 and 10 above.
[By] EXXON PIPELINE COMPANY
(by R. J. Flynn) (219 pp.)

6/22/77 27. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] UNION ALASKA PIPELINE COMPANY
(by D. M. Schwartz) (25 pp.)

6/22/77 28. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] PHILLIPS ALASKA PIPELINE CORPORATION
(by R. M. Shibley) (11 pp.)

6/22/77 29. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] SOHIO PIPE LINE COMPANY
(by C. J. Lansdale) (34 pp.)

6/22/77 30. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] AMERADA HESS PIPELINE CORPORATION
(by R. Moody, Jr.) (25 pp.)

6/23/77 31. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] BP PIPELINES, INC.
(by J. Vickrey) (21 pp.)

6/23/77 32. SECOND SUPPLEMENT: To petition and complaint in item #'s 9 and 13 above.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by W. W. Becker) (8 pp.)

6/23/77 33. STATEMENT
[By] ALASKA PIPELINE SYSTEM
(by B. E. Benjamin) (13 pp.)

6/23/77 36. REPLY: To the protests in item #'s 6, 7, 9 and 10 above.
[By] ARCO PIPELINE COMPANY
(by R. E. Jordan, III) (198 pp.)

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6/27/77 37. LETTER: Addressed to Douglas Baldwin. requesting the Commission to reconsider its decision to close the special meeting scheduled for 6/28/77.
[By] UNITED PRESS INTERNATIONAL
(by G. Dillman) (2 pp.)

6/27/77 38. LETTER: Addressed to H. Gordon Homme. requesting. . . .
[By] DIANE B. COHN (on behalf of Edward K. DeLong, U.P.I.) (2 pp.)

6/27/77 39. LETTER: Addressed to A. Daniel O'Neal, requesting. . . .
[By] COMMON CAUSE
(by D. Cohen) (1 p.)

6/27/77 40. ORAL ARGUMENT: For testimony adduced at the oral argument held 6/27/77, see Volume 2 on page 9 herein.
[By] THE COMMISSION (208 pp.)

6/27/77 41. MOTION: For leave to file memorandum in reply to the responses of the carriers.
[By] THE DEPARTMENT OF JUSTICE
(by D. A. Kaplan) (9 pp.)

6/27/77 43. ORAL ARGUMENT EXHIBITS
[By] STATE OF ALASKA
(by J. M. Cleary) (10 pp.)

6/27/77 44. ORAL ARGUMENT EXHIBITS
[By] BUREAU OF INVESTIGATIONS AND ENFORCEMENT
(by E. D. Greenberg) (14 pp.)

6/27/77 TRANSCRIPT OF ORAL ARGUMENT: NO EXHIBITS IN EVIDENCE
(BY THE COMMISSION) (206 pp.)

7/1/77 45. THIRD SUPPLEMENTAL PETITION: And COMPLAINT.
[By] ARCTIC SLOPE REGIONAL CORPORATION
(by J. T. French) (4 pp.)

7/5/77 46. CONFERENCE: For testimony adduced at the conference held 7/5/77, see Volume 2 on page 9 herein.
(BY THE COMMISSION) (19 pp.)

Date

7/12/77 47. PROTEST/COMPLAINT: Seeking suspension and investigation.
[By] STATE OF ALASKA
(by J. M. Cleary) (10 pp.)

[End of Docket Entries in No. 36611 certified by the Secretary]

INTERSTATE COMMERCE COMMISSION

Docket I & S 9164

6/28/77 1. ORDER: That the operation of specified schedules is suspended, that the use thereof in interstate or foreign commerce be deferred from 6/30/77, and to and including 1/29/78, except as to I.C.C. 2, published by Amerada Hess, which bears a July 1 effective date and the operation of which is suspended to 1/31/78, unless ordered by this Commission; that an investigation is instituted into and concerning the lawfulness of the rates contained in the suspended schedules, as well as the interim schedules authorized to be filed, pursuant to section 15(1) and section 15(7), with a view to making such findings and orders in the premises as the facts and circumstances shall warrant; that the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said rates under the IC Act; that the named carriers are authorized to file, upon not less than one day's notice, interim rates not exceeding specified amounts subject, however, to specified conditions; and that the said carriers are made respondents to this proceeding. (This order also embraces No. 36611).
BY THE COMMISSION (Commissioner Brown approves the order except insofar as it denied the motion of the Department of Justice for leave to file a response to the carrier's responses) (21 pp.)

7/8/77 3. PETITION: For Reconsideration.
[By] EXXON PIPELINE COMPANY
(by R. J. Flynn) (20 pp.)

Date		
7/15/77	8. NOTICE: A court action was instituted on or about 7/6/77, involving these proceedings before the U.S. Court of Appeals for the Fifth Circuit. [By] H. G. HOMME, JR., Acting Secretary	(1 p.)
7/15/77	9. NOTICE: A court action . . . on or about 7/8/77. . . .	
7/19/77	10. NOTICE: A court action . . . on or about 7/11/77. . . .	
7/26/77	11. NOTICE: A court action . . . on or about 7/13/77. . . .	
	[End of Docket Entries in No. I & S 9164 certified by Secretary]	

Transcript of Oral Argument Before Interstate Commerce Commission

BEFORE THE INTERSTATE COMMERCE COMMISSION

- x

In the Matter of: :

TRANS-ALASKA PIPELINES SYSTEM : No. 36611

- ORAL ARGUMENT - :

- x

Hearing Room B
Interstate Commerce Commission
12th & Constitution Ave., N. W.
Washington, D. C.

June 27, 1977

Met, pursuant to notice, at 9:00 a.m.

BEFORE:

COMMISSION MEMBERS PRESENT:

COMMISSIONER A. DANIEL O'NEAL, Chairman
COMMISSIONER CHARLES L. CLAPP, Vice Chairman
COMMISSIONER RUPERT L. MURPHY
COMMISSIONER DALE W. HARDIN
COMMISSIONER BETTY JO CHRISTIAN
COMMISSIONER GEORGE M. STAFFORD
COMMISSIONER ROBERT C. GRESHAM
COMMISSIONER ALFRED T. MAC FARLAND
COMMISSIONER VIRGINIA MAE BROWN

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P R O C E E D I N G S

The Clerk: The Interstate Commerce Commission is now in session to hear oral argument in Case Number 36611, Trans-Alaska Pipeline.

Commissioner O'Neal: Good morning.

We thank all of you for attending this oral argument. I want to make one announcement before we get into the remainder of the statement.

The Commission has just voted on two petitions to open the Commission conference on the Trans-Alaska Pipeline scheduled for tomorrow. By a majority vote, the Commission denied those petitions to open that conference, two Commissioners voting in the minority, the Vice Chairman and the Chairman.

Before the Commission for consideration at this time are the initial tariff filings of the eight pipeline companies which comprise the Trans-Alaska Pipeline system.

The rates proposed in these initial tariffs range from $6.04 per barrel to $6.44 per barrel and they bear effective dates of June 30, 1977 or later.

Protests have been filed by the State of Alaska, the Department of Justice, the Commission's Bureau of Investigations and Enforcement, and the Arctic Slope Regional Corporation, representing the Alaska natives.

Replies to the protests have been filed by the various individual pipeline companies and the service company, Alyeska.

This oral argument has been scheduled to provide the Commission and the parties with an opportunity to explore the issues involved.

You may be assured that the Commission will carefully study and evaluate all the pleadings which have been filed.

Accordingly, I ask you, in this oral argument, not to dwell too much on matters already set forth in the justifications, protests, or replies. Concentrate, if you will, on the major issues which must be resolved.

One final word about the ground rules, any Commissioner will be free to ask a question of counsel at any time. In order to avoid any unfairness, the parties will be kept to their alloted argument time. The pleadings that have been filed and the rebuttal or re-rebuttal periods, should provide adequate opportunity for each of you to have your arguments considered if that opportunity is not available on your first presentation.

Accordingly, unless you are answering a question when your time expires, I ask that you conclude your presentation immediately when the red light indicates that your time is up.

We'll begin now with the representatives of the pipelines. Would you come forward, please, and state your name, your full name, the name of the party or parties whom you represent?

Mr. Flynn: Mr. Chairman and members of the Commission, my name is Richard J. Flynn and I appear in this proceedings on behalf of Exxon Pipeline Company.

For the convenience of the Commission and to avoid unnecessary repetition, counsel representing the eight-owning pipelines have divided up the argument with respect to the common issues.

With respect to their individual rates, they rely primarily upon their written submissions.

Not all pipelines will be represented in this argument but all are represented in the room in the event questions arise concerning pipelines not presenting oral argument.

There are two, I guess, or three preliminary matters I'm raising on behalf of everyone.

This morning the Department of Justice handed us a lengthy reply to our reply. The Commission's rules do not permit such a reply to a reply. Counsel for the State of Alaska and for the Bureau of Investigation have handed us what they designate as oral argument exhibits. It is my understanding that most recently, in considering the efforts of the Milwaukee to secure inclusion in the Burlington Northern, this Commission has rejected such exhibits.

I haven't really studied Mr. Cleary's, but I note that the Bureau's presentations are not simply excerpts from their briefs, but represent a new set of calculations. And I state on behalf of the owning pipelines that we object to all three of those presentations.

Our appearance here today marks what is one of the last steps in what has been a very long and hard road for these pipelines in an effort to create a transportation system to bring crude oil from from Prudhoe Bay to --

Commissioner O'Neal: May I ask you a question?

Mr. Flynn: Yes.

Commissioner O'Neal: Do you plan to reserve any time for rebuttal? You should let us know what that is.

Mr. Flynn: We will all collectively reserve a half-hour for rebuttal.

Commissioner O'Neal: 30 minutes, okay.

Mr. Flynn: The opening arguments are intended to run no more than two hours.

We have constructed a transportation system to bring crude oil from Prudhoe Bay to Valdez where it can finally be moved by ships to the lower 48 states to meet some of the critical energy needs of this country.

We are here because even though the pipeline is physically capable of operating, none of the owners of that pipeline, each of which is a common carrier as a matter of law, can operate it without a tariff which has become effective.

As the Chairman mentioned, each has filed its own tariff, as they are required to do. They are scheduled to become effective in time to place crude oil on the ships when it reaches Valdez.

If the tariffs aren't effective, we cannot, as a matter of law, operate; we cannot accept the oil for transportation. Now, we are here really because there are four parties named by the Chairman, the Bureau of Investigations and Enforcement, the Department of Justice, the State of Alaska and the Artic Slope Regional Corporation don't like the rates we have filed.

They think their judgment as to a proper rate is better than that of the pipeline and they are asking you to substitute their judgment for the pipeline's to permit only lower rates which they propose to become effective.

If you should accept their remedy, in effect, you will have rejected the filings of the pipeline companies without any hearing because they don't propose that we have a hearing on our filed rates, they propose only a hearing on those lower rates.

Now, if you are going to reject our filings, you have certain standards to meet. Recently, in Associated Press versus the Federal Communications Commission, the Court of Appeals for the District of Columbia recognized that an agency does have the power in some cases and, in some cases perhaps a duty to reject a tariff that's unlawful on its face.

The rejected tariff that conflicts with the statute, with an agency regu[illegible] an order, or with a rate fixed in a contract sanc[illegible]ed by statute -- not sanctioned by statute, or a tariff can be rejected if it is unlawful unless you get

prior agency approval and you haven't gotten it. Those are about the only circumstances.

Now, other counsel will deal with the question of whether this Commission, in fact, has any power to suspend an initial rate. And other counsel will also deal with what I think is clear that the Commission does not have the power to impose a lower rate as a condition of not exercising its suspension power.

We will also, in later portions of this argument, deal with the questions of level of return and equitable considerations which arise out of the Commission's exercise of its suspension power.

It's my purpose to try to place this proceeding in context so we can understand, really, what we're dealing with here. In determining whether or not to exercise its suspension power, this Commission is not passing any judgment on whether or not the rates filed by these pipelines are just and reasonable; it can't.

Statute permits it to make that judgment only after it has had a full hearing. Nor is this Commission deciding that it will just let these pipelines file their rates and go right along.

The Commission can and I'm sure will institute an investigation of these rates whether or not it decides to suspend it. All we're deciding here is whether the tax rates, as

filed by the various pipelines, go into effect now so that the pipeline can operate, or whether they are held up while the Commission goes ahead and investigates those rates.

If the Commission doesn't suspend the rates, the pipeline's payments are, of course, subject to claims for repayment in the event the rates are ultimately found to be excessive.

If it does suspend, as I have said, we'll be sitting with an inoperable pipeline, losing vast sums of money, with no chance ever to recover it.

Now, the suspension power, as committed to this Commission's discretion, is subject only to the requirement that if it elects to exercise that power, it must state its reasons. And because it is a discretionary power and because it is so rarely exercised, there is not a great body of firm, fixed guidelines that state exactly how it's going to exercise that power.

But, given the nature of that power, it seems to us there are some things that the Commission should surely have in mind as it makes its decision.

In the first instance, the regulatory scheme which this Commission administers contemplates that rates will be initiated by carriers in the first instance. And in the case of initial rates, the carriers are presumed to have acted properly in establishing those rates.

Under the Act, in the case of an initial rate, the burden of proof is upon one who would challenge that rate. The carrier is not required to come in and prove that the rate is just and reasonable. The Protestants are required to prove that it is not.

I think another thing that should be kept in mind is that the suspension proceeding is, by its nature, a summary. No broad decisions are to be reached. It is not the occasion for attempting to resolve intricate, factual questions, disputed issues of fact. It is not the occasion for re-examining the methodology by which the Commission is going to determine its rates.

The Commission has acknowledged, really, that in the case of an initial rate, the suspension exercise is even more summary than in the case of an increased rate since it has, by general rule, shortened the notice period to 10 days.

I think that, because of the nature of these proceedings, you can save yourself a lot of time. The Protestants, most notably Alaska, have furnished you with a vast amount of material which they allege shows that the original costs are overstated.

We have not attempted to reply to that at this time. It is not the place to do it. The Commission is required, by statute, to undertake evaluation proceeding and, in that proceeding, to give consideration to original cost and, if Alaska and any other Protestant cares to make its argument about the cost of this project, they have a forum to do so.

It is also, I think, worth noting with respect to these charges -- I guess, I'll characterize these as -- that nobody asks you to do anything about them now. They are stated at

great length. They are put up with a one-sided statement, or very forward, I guess, on yesterday's television and this morning's newspaper, but you are not asked to do anything about that here. The Bureau correctly points out that those are difficult matters of fact which will have to be resolved after a hearing. And they are not a basis for suspension.

Again, by virtue of the nature of these proceedings, it is not the time to decide whether or not this Commission should depart from ratemaking based on valuation and go to a capitalization theory as the Department of Justice and Alaska press. That ratemaking method, whatever disputes we have with the Bureau about the details of how you apply the valuation process, that type of ratemaking has never been engaged in by this Commission. I doubt that it could, under the statute.

If it can, that's a matter that will be tested in another proceeding which is already under way, Ex Parte 308, where you are reconsidering methodology and you are considering rate of return.

The Artic Slope proposal would require a myriad of adjustments to original cost, to treatments of taxes, to depreciation. And I don't think that can be resolved on this proceeding.

Now, I think Alaska is certainly aware that this Commissic has already held very recently that what it is proposing here is not the proper subject even for a full-scale rate investigation. You announced that in the Williams Pipeline proceedings. Alaska is aware of that. Its counsel has attempted to get you to depart from valuation proceedings in respect to Williams Brothers for a great length of time, now, and you have turned him down.

Now, if you can't do it in a full-scale rate investigation surely you can't do it in a suspension proceeding. I don't think that you need to spend your time even considering the capitalization approaches advocated by the Department of Justice and by Alaska.

The one Protestant who clearly is attempting, at least, to follow valuation rate making is your Bureau of Investigation. And they recognize that, since you were given jurisdiction over pipelines -- provided that you will establish evaluation for each pipeline -- that that valuation would be prime facie evidence in all other proceedings under Part 1 of the Act, and that you will test rates by measuring them against the reasonable return on valuation.

Where we think the Bureau goes off the track is in

applying that. The principal dispute between the pipelines and the Bureau is that the pipelines contend that you should adhere to what we say has been the customary practice. Treat interest cost as an expense and apply your valuation limitations against net income after taxes.

The Bureau, on the other hand, says that the interest expense should be recovered in the return.

Now, as a matter of first impression, I suppose you might adopt either of those procedures. We submit that you adopted what we said, with the single exception of the Williams Brothers case, where you had a pipeline that really didn't care; and that its rates were so low, no matter which way you tested them, they were found to be just and reasonable.

And I don't think that represents a thoroughgoing reconsideration or an adoption of the methodology urged by the Bureau here.

We know what we've been doing. It seemed a little strange to me that I started out to try to deal with the Bureau's reliance on a 1935 case to demonstrate what was going on today. And I stopped, because that just seemed a little silly.

We know how we have fixed our rates. We have done it in the method we have said here. We think, if not you personally, you collectively, as a Commission, know how we have fixed our rates.

When asked by Congress to explain what the returns on

valuation were for the pipelines, you used exactly the method we did in making your own calculations; and furnished the Congress with returns on valuations for some 90 pipelines which you regulate, all of which were calculated by treating interest as an expense.

The Department of Justice has clearly understood that return on valuation is calculated, as we say it is. Only last year, Attorney General Levy, in dealing with the Loop and Seadock projects, described the Commission's methodology as exactly what we say it is, return on valuation is calculated on net income after taxes, after deducting interest as an expense.

The Federal Power Commission, quite recently, in dealing with an Alaskan gas pipeline, has indicated it knows how this Commission has acted in the past. That is, to calculate return on valuation on the basis of net income after taxes, after deducting interest as an expense.

Now, others will deal with the reasonableness of a return under whatever method you use here. I would say that the showings before you indicate that we have nothing to fear from the adoption of the Bureau's method. It's just, this isn't the place to do it. That's a proper subject for Ex Parte 308.

We think in a suspension proceeding, what you should do, is to look at the rates as filed to satisfy yourself that they have been calculated in accordance with the practice heretofore followed by this Commission, and if you find that they have, then stop, and exercise your discretion not to suspend.

The question of rates of return for an exotic pipeline and the Antarctic can't be decided in a suspension proceeding. The factual allegations about original cost can't be decided in a suspension proceeding.

We've put before you a rate calculated in the same manner we have been following consistently for years and we're entitled to have that rate tested, not some lower rate.

Thank you.

Commissioner Hardin: I have a question.

Mr. Flynn: Yes.

Commissioner Hardin: Your last statement there implies, at least, that the Commission then does have the power to suspend?

Mr. Flynn: The presentation made by Mobil Oil in its brief, I think, raises a very sustantial issue with respect to the Commission's power to suspend. That presentation shows that there is no place that you can say that it's been absolutely decided one way or another. But the background of the Act, which Mr. Kilcarr will deal with as soon as I sit down, does suggest that you do not have the power to suspend an initial rate.

What I have been saying has been on the assumption that you do and what you should do, assuming that you have that power.

Commissioner Hardin: If we do not have the power to suspend then would the carriers be in a position to file a rate, say, at $35 a barrel, and the Commission still could not suspend that?

Mr. Flynn: If you do not have that power, that would be

right. That would be Congress's decision.

Commissioner Hardin: And that is the position that I understand you are taking, that we do not have the power to suspend and they could file a rate at any level they want to, irrespective of the public interest.

Mr. Flynn: Pipelines are taking the position that you do not have the power to suspend an initial rate. But the horror case that you propose is not the one before us. The rates that we have before us were not calculated on that.

Commissioner Hardin: But it could be before us?

Mr. Flynn: Yes, I suppose it could be. It is not. And if that is a danger and if you do not have the power to suspend, perhaps to prevent that, you should seek that power.

But these rates meet both the tests that this Commission has applied and, in addition, are held down by the consent decree entered into in 1941, to an even lower return.

Commissioner Hardin: Thank you.

Mr. Kilcarr: May it please the Commission, my name is Andrew Kilcarr and I represent Mobil Alaska Pipeline Company and I will speak to the major, indeed, basic issue before the Commission and that is its authority to suspend its authority to establish interim rates.

And may I depart from my prepared remarks and respond to the Commissioner's last question in terms of the hypothetical $35 dollars. There is no doubt that the Commission has no authority to suspend; thus, the rate first and only filed by a carrier would prevail.

The $35 rate or some other horrible extension of that basic premise doesn't realistically apply, Your Honor, because the basic maximum rate on the oil has been set by the FEA. Secondly, you would not have rates like that on this system nor, I suggest, on any system that so departed from the basic costs and valuations for the simple reason that on this system, as on other pipeline systems, there are carriers who are not producers, who are on the pipeline as joint interest owners to produce revenue to attract shippers and at a prohibitive rate such as that, the shipper would not be attracted to the pipeline and I think that's --

Commissioner Hardin: Mr. Kilcarr, let me make clear why I asked the question. I used, obviously, a level of a rate way beyond anything that had been proposed or discussed.

Yet, there are allegations in this record that relate to the management and holding down of the cost. But what I am concerned with seeing developed here is precisely where we are going with respect to those kinds of allegations and that's what I would like to hear you address yourself to, on that particular point.

Mr. Kilcarr: Your Honor, with due respect, we have not allocated the argument, so I am not fortunate enough to have that responsibility. I did want to meet the hypothetical, however, and having said that, I would like to now return to what I consider to be, and others in this proceeding, the basic major issue and that is the authority of the Commission.

Let there be no doubt that the Protestants here have requested relief which would have the Commission, at the conclusion of this proceeding, cancelling the first and only tariffs filed by the carriers and then setting a new rate for the carrying of crude oil on the Trans-Alaska Pipeline System setting a new rate.

The word "suspension" and "interim rate", I suggest constitute camouflage because a rate would not be suspended, it would be emphatically and dramatically cancelled. And Mr. Flynn has just spoken to the implications of that. The Bureau's petition in protest says it quite explicitly.

Secondly, there is the matter of interim rate and there is, I respectfully suggest, no such beast in the legislation

which this Commission acts under. There is no interim rate basis in the legislation. There is a rate determination and prescription section, but there is no authority to establish interim rates.

Commissioner O'Neal: Isn't it true, Mr. Kilcarr, that the Commission has suspended initial rates in the past?

Mr. Kilcarr: The Commission has suspended initial rates, Your Honor; quite emphatically, yes. And I would suggest --

Commissioner O'Neal: Is there any court that has held that the Commission did not have that power?

Mr. Kilcarr: Pardon?

Commissioner O'Neal: Has any court held that the Commission did not have that power, that you are aware of?

Mr. Kilcarr: No, sir; no court has held that the Commission, in exercising the power in those cases, did not have the power. And the point to be emphasized is that those cases are entirely distinguishable from the case that presents itself to you this morning.

The difference is that in all of those cases, there existed a pre-existing rate. There was at work a change in that rate and it was the change proposal that was suspended. Some of the cases get into a declination of change versus initial rate but, in all cases, I suggest, there was an existing rate so that when the suspension occurred, there was no termination of transportation service during the period of

the dispute.

That, in addition, is another reason why, and another basis upon which it must be concluded that this Commission cannot suspend a first and only rate, because suspension of that rate leaves a total void.

There is nothing that comes in and keeps the service alive, if that rate is suspended.

Commissioner Hardin: But conversely then, on the premise Mr. Kilcarr, who would have the responsibility for the protection of the public interest?

Mr. Kilcarr: I believe, Your Honor, that you have the responsibility to protect the public interest and in exercise of that responsibility, you cannot, without additional reason, suspend this first and only tariff, because if you did, sir, the implications for the public interest would be horrendous. The Trans-Alaska Pipeline Act says that it is in the public interest that the early distribution of North Slope oil to the domestic markets occur. If you were to suspend this rate,these rates, filed by these carriers in the Trans-Alaska Pipeline System, there would be a void. And we --

Commissioner O'Neal: But suppose the Commission suspends, as it has done in some other cases, without prejudice,to refiling at a lower rate?

Mr. Kilcarr: It would be a suspension, Your Honor, and the void that you are coming close to has been very amply filled by the Protestants because they recognize the void; they recognize the implcations to the national economy and the national energy policy of the United States, so they are telling you that you should set an interim rate.

Commissioner O'Neal: But isn't this a void that could be filled rather easily if the pipelines merely file a rate that doesn't exceed whatever the Commission has viewed as one that they [illegible]ccept?

Mr. Kilc[illegible]: As to the simplicity, the mechanics, and the logistics of doing that, Your Honor, I can't deny that.

Certainly, it would be very simple. But, as to the legal implications, I would say that it would be absolutely unlawful. There is no doubt in terms of a long list of cases, beginning not necessarily with,the Moss versus Civil Aeronautics Board case, but certainly best exemplified in the Moss Case, that when a regulatory agency, such as this agency, attempts to suggest a rate, to prescribe a rate without conducting a full, evidentiary hearing, that its statutory authority requires, then that agency is engaging in economic cohersion.

Another case has called it blackmail, in that you have deprived the carrier of its right, under the Act and by common law, to set its initial rate when it enters into and becomes engaged in transportation. And, secondly, you have deprived the carrier of any option because the carrier has invested substantial monies in a system which will be shut down. In this case, it is $8 billion.

So that, if you, as a Commission, entered a suspension order and said -- well, however you said it,suggested a rate or suggested some maximum,or minimum or whatever, you would not only be directly foursquare within the Moss Case and all of the other cases that have decided that this can't be done, but you would, realistically, probably give some of these carriers no option.

They are sitting on top of $8 billion. They've got to have that start generating revenue. They are going to have to

do, probably, at least some of them what the Commission wants it to do. The courts recognize that for what it is. It is economic cohersion. Other courts have put a more apt label on it, Mr. Chairman. They have called it a "sham suspension order". The Bureau calls it a "conditional no suspend order". "Sham" is much more appropriate, because you are, realistically, not suspending. Realistically, you are telling them, "We're going to set the rate for you, or we're going to deprive you of your right to set the first and only rate on your pipeline". And when you do that, then, we'll go into our investigation and hearing.

Commissioner Hardin: Well, wouldn't that same principal be true in the prescription of a rate even if it is a changed rate?

Mr. Kilcarr: Well, it depends, Your Honor, on how the prescription occurs. Does it occur in accordance with Section 15(1) of the statute which says, right at the outset, "after full hearing the Commission may determine unreasonableness, unjustness and, then prescribe a rate".

Commissioner Hardin: Then it is your position that the exigencies of the situation that you have just described would not change that circumstance at all?

Mr. Kilcarr: Absolutely correct, Your Honor. There is only one basis upon which the Commission can prescribe a rate -- can determine a rate,and that is after a full hearing.

Yes, sir?

Commissioner MacFarland: No, I just want to be sure that I caught everything you said. Go ahead, sir.

Mr. Kilcarr: And I believe the words of that section, Section 15(1), are very significant, "after full hearing", "after". It establishes a mandatory condition precedent to the determination of, or and/or prescription of rates by this Commission. "Hearing", a record -- a record must be established for purposes of making the determination. There must be evidence, Your Honors, and in this proceeding there is no evidence before the Commission.

Your own rules state that explicitly. Rule 19 says that pleadings constitute evidence,but pleadings in petitions to suspend tariffs -- filings in petitions to suspend tariffs do not constitute pleadings, i.e., these filings do not constitute evidence. You have no evidence of unreasonableness, of unjustness as to these first and only filed tariffs. You have no basis upon which to make the determination that these Protestants would want you to make.

And finally, the word "full" is in there, "after full hearing", and that word signifies the implementation of the totality of judicial machinery, discovery by both sides, documentary and testimonial evidence, of record, and, indeed, the most basic of all record evidence, that which results from cross-examination,which we have not had to date, in

addition to everything else which we lack in this summary proceeding.

Consequently, there is no basis upon which this Commission can do anything by way of suggesting or affirmatively, for purposes of filling the void which would occur should you, on an equally unlawful basis, I respectfully suggest, suspend the tariffs that were filed by these carriers.

There would be an absolute void which could not be filled by suggestion or otherwise and the cases make that absolutely clear.

Let me also say that in this connection, where we are being asked to treat with, in a summary proceeding, the suspension of tariffs which we have a statutory right to have in operation during the period of investigation and hearing, and where you are being asked to set an interim rate, the Constitution of the United States has been, I suggest, absolutely invoked in these proceedings.

What you are being asked to do, I respectfully suggest, is to perform an unconstitutional act. You are being asked to deprive carriers of profiting without due process of law.

The cases in this area are in abundance. I would read, with your permission, only one extract from the Louisville Nashville Case in the Supreme Court. "A finding without evidence is arbitrary and baseless", said the Court, and went on to say, "it would mean that the Commission had the power possessed by no other officer, administrative body, or tribunal, under our government. It would mean that where rights depended

on facts", as they do here, "the Commission could disregard all the rules of evidence and capriciously make findings by administrative fiat", which you are being asked to do here.

Yes, ma'am?

Commissioner Christian: Mr. Kilcarr, do I understand then that your last argument is that regardless of how the statute reads at the present time, Congress would have no power to grant the Commission the power to suspend an initial rate?

Mr. Kilcarr: That is not the reach of my argument, Your Honor, and I apologize if you construed it so.

Commissioner Christian: Then what is the point of this last item?

Mr. Kilcarr: The point is that the statute captures the Constitutional guarantee of a hearing, of due process, and to deprive us of the hearing, and to set an interim rate, would be, in addition to a violation of the Act, it would be a violation of our Constitutional rights.

That is not to say that the Congress could not, as they did in 1910, extend, legislatively delegate to this Commission, the right to suspend first and only filed tariffs, which they have not done. They could probably delegate legislatively to this body the right to set interim rates, setting out a legislative rationale for that.

But that is not part of my argument. My argument is that

they have not done that. And to the extent that the Congress has guaranteed us a hearing, as does the Constitution, to do what the Protestants ask you to do, would not only violate the Act, it would violate these carriers Constitutional rights.

I would conclude my presentation, with Your Honor's indulgence, by speaking to the question raised in the Bureau's protest concerning a third part to the proposed order. The first part would be the suspension. The second part would be the suggestion or the setting of the interim rate. A third part would be that the Commission order the carrier to comply almost forthwith with an enormous subpoena.

But it's not a subpoena. It's a document demand that they would have you attach to your order and impose upon us, in direct contradiction of and contravention of the discovery rules of this Commission.

What they are trying to do, it seems clear, is to circumvent your discovery rules, to get you, as a body, to ignore your own rules of discovery and investigation.

We suggest that that is impermissible, that this is unfair and that it should not be indulged.

At the same time, we do state to the Commission that we will cooperate in any investigation that is going to be forthcoming from these proceedings, to the extent, hopefully, of even minimizing compulsory process and producing information from our resources, on a voluntary basis.

We would hope that the Protestants would act accordingly and cooperate also.

Our record of cooperation has been made clear to the Commissioners in the submission by the Alyeska Pipeline Company, where it demonstrates the production of documents and the number of interviews that have already been conducted on a informal, voluntary basis, with your accounting consultant, and not under compulsory process.

We would suggest that that is your record. We would commit to continuing. But we would not, in making that commitment, want to confuse anyone with the idea that we would accept and accede to this attachment to your order, requiring the production of this enormous amount of documents.

And with that I would conclude my presentation and thank you, Your Honors.

Commissioner O'Neal: Thank you.

Yes, sir, go ahead.

Mr. Jordan: Mr. Chairman, Commissioners, my name is Robert Jordan. I'm appearing this morning on behalf of ARCO Pipeline Company but, under the division of argument by counsel for the eight carriers, I've been asked to discuss some issues which have been raised with respect to rate of return.

Now, at the outset, I would like to make one thing perfectly clear, as the saying used to go here in Washington, the carriers here do not suggest, indeed, they actively oppose the concept that this Commission should try to establish new rate of return criteria in this suspension proceeding.

Mr. Flynn has already indicated to you that the proper place to do that is in Ex Parte 308. That proceeding was specifically broadened. It started out as an evaluation proceeding and the question of rate of return was consciously added to it. That is the proper place for there to be any breaking of new ground, any new departures, any new methods to be developed with respect to rate of return.

So, our position is that it would be wrong, as a matter of law, to do that in terms of trying to invoke rulemaking in a summary suspension proceeding. We also say it would be wrong as a matter of policy. It's the kind of thing the Commission ought not to do.

The Commission, just last December, said in the Williams Brothers' case that it was not going to take up issues like this in connection with the tariff filings of individual pipelines. That was a sound and proper decision by the Commission at that time. It remains sound and proper today.

Having said all that, I do wish to say this. The Protestants here have cited to this Commission in their papers certain inflammatory and wholely erroneous figures concerning a rate of return which the carriers would earn on their tax investments.

These, we feel, cannot be left standing without at least some comment. The fact that we're commenting does not represent any deviation from our basic position that this is not the time or the place to engage in new developments with respect to the Commissions's policy on the rate of return for oil pipelines.

Our view is that there is, in fact, a responsible range of debate about rate of return questions. We are all aware that different regulatory bodies do things slightly differently and it is not to say that there is not some leeway for looking at problems first one way and then the other.

The underlying, bottom line position, of course, must be that however you count the apples and however you count the oranges and however many lemons you throw in, the bottom line is that the carriers must be allowed to earn a fair rate

of return.

It is our view, our contention, that the approaches contended for by the Protestants here are really outside of that range of responsible debate about rate of return issues.

Now, let me give you some examples about the kinds of horror story numbers that have been floated in the Protestants' papers. The Antitrust Division protest talks of rate of return figures of 58 to 68 percent at a 10 percent equity which, commonly referred to, is a 90-10 debt equity ratio.

The Bureau of Investigations and Enforcement speaks of a 100 percent rate of return at seven percent equity, or what is commonly referred to as a 93-7 debt equity ratio. The State of Alaska speaks of 37.6 percent returns through 264 percent returns and, indeed, in the case of Mobil Alaska, suggests that the rate of return in that case is infinite.

I would note that this particular statement with respect to Sohio was contradicted by calculations in Alaska's own papers.

There is a basic flaw, a fundamental flaw, in all of these numbers and the flaw is this; that either unknowingly or deliberately -- and, frankly, I find it hard to think that it's unknowingly, given the qualifications of the people who appear on behalf of the Protestants -- all Protestants fail to note that in the case of the Trans-Alaska Pipeline System, this system could not have been built if the parent companies

of each of the pipeline subsidiaries had not either guaranteed the debt of those pipeline subsidiaries or furnished other equivalent forms of direct assistance in the way of financing. It could not have happened that way.

Now, what this means is that the capital structure of the pipeline's subsidiaries, these 90-10 debt equity ratios that are flouted before the Commission, 93-7 debt equity ratios, 85-15 debt equity ratios are wholly without economic significance. They are are artificial.

They could never exist without the parent guarantee or other similar parent support. The pipelines could never be established as independent entities with the debt equity ratios which appear on the books of these pipeline companies.

Now, who says so?

Commissioner Clapp: If the point, Mr. Jordan, that this project is a low risk operation makes any difference in connection with what you're saying, certainly a tremendous proven reserve of oil is being shipped. Are the pipelines the only foreseeable way to transport it? And the world is consuming oil at an unprecedented work rate.

To me, this is an extremely secure investment, which is conducive to a high ratio of debt to equity, and which lessens the danger that the guarantees provided by the companies will be necessary.

Mr. Jordan: Well, I'm going to answer that in a couple of ways. And I'm going to talk a little bit about the rate of return for minimum risk pipelines here in just a moment.

First of all, we reject the thought that this is a low risk pipeline. The companies here suffered, as has already

been noted, considerable difficulty just getting authority to build the pipeline. They suffered considerable difficulty during the building process.

This pipeline was started before the Arab embargo, when the companies first began planning this in 1968 and '69, so the initial commitments to this line were made long before anyone knew that the price of oil was going to escalate the way it has.

There are all sorts of natural problems in Alaska. The line has been designed to resist all of these. But there are earthquake problems, there are temperature problems, every conceivable form of difficulty.

And who knows? Who knows what the future holds with respect to oil? You're talking about a reservoir of oil in which people say we will be able to recover approximately 40 percent of 24 billion barrels in place of approximately 9.6 billion barrels. That's a prediction.

You've seen the studies, some of which were cited in the Protestants' papers, that show that it varies a great deal, depending on when you start taking gas, and how much gas you start taking, and at what rate you produce the oil.

To say that these are low risk pipelines, I think, is simply not accurate. This is a very risky venture. This is not your nice, easy pipeline across the flat part of Texas. It's coupled with all kinds of problems, not the least of which

is the overall uncertainty about the long term energy situation.

But I'll give you, in just a few minutes, the numbers that were derived with respect to low risk pipelines, if you want to use those as a baseline from which to build a proper rate of return.

Commissioner Brown: The quality in regard to this oil -- is this the highest quality oil there is in the world, or is it medium, or is it high?

Mr. Jordan: It's not the highest quality in the world because, to some extent, of its sulphur content. The oil business has a way of compensating for these by differentials.

In other words, you will take a bench mark crude oil, and that's worth so much. And the refinery will calculate that, if we're going to run this other oil, in relation to the bench mark, it's worth 50 cents less a barrel to us. This is not the highest quality oil.

You have to compare the two. You may have to put in special stainless steel or other sort of exotic metal facilities, in order to handle the extra sulphur content. Sulphur disposal becomes a problem.

There is material that would have to be removed from the oil in sort of a cleaning process, at the North Slope, before it even becomes of pipeline quality.

Commissioner Brown: Thank you.

Mr. Jordan: Let me tell you a little bit about what some

of the experts have said about these kind of crazy debt equity ratios that have been cited in the Protestants' papers.

As appendices to the Exxon response in this proceeding were the statements of Mr. Gary, an experienced investment banker with Morgan Standard, Inc., Dr. Solomon, professor of finance at the Stanford Business School.

Attached to the ARCO papers as Appendix D and E were the statements of Mr. Robert Houston of White Well, Dr. J. Rhodes Foster of Foster Associates.

Now, these gentlemen all have substantial experience in matters relating to rate of return and the capital structure of companies. And they all say that these debt equity ratios of the pipeline companies are simply without economic significance, that you just can't measure things that way. It just doesn't make any sense.

And what you have to do instead --

Commissioner Christian: Mr. Jordan, this same issue, this concept of computing rate of return on debt equity ratios, is considered by a number of regulatory agencies. Has this same argument, concerning the use of a parent company's debt equity ratio as opposed to that of the subsidiary itself, come up in other contexts before other agencies? And if so, what have those agencies ruled?

Mr. Jordan: I am sure it has come up in other contexts. Let me give you an example. The Federal Power Commission recommendation that was cited in the Exxon Papers at page XII-47, contains a table, and that table relates an overall pre-tax rate of return with equivalent after tax rates of return on equity at three different debt equity ratios. So, it very definitely recognizes that there is a great deal of significance to the debt equity ratio.

Now, they are talking there about lines that would be financed by the the entity, itself, and, eventually, a project financing, not something that somebody would come in and guarantee it and shift the risk.

The point is here, the parents have come in. They have assumed the risk. If those Arco Pipeline Bonds or those Exxon Pipeline Bonds are not paid off the by pipeline company, they are going to have to be paid by the parent, and that's the point.

But let me give you just one example from this Federal Power Commission table. This is a very recent publication. They suggested an overa ll pre-tax rate of return on the level of, let's say, 23 percent, would not be unreasonable, under the circumstances which they set forth there. And this is for the gas pipeline, by the way, coming down from Alaska through Canada, or otherwise.

The equivalent rate of return on equity, at a debt equity

ratio of 25-75 was 13.7 percent; at 50-50, it was 18 percent, and 75-25, it was 31 percent. So there definitely is a recognition.

Commissioner Christian: Was this issue discussed by the Power Commission in their presentation?

Mr. Jordan: Pardon?

Commissioner Christian: Was this particular issue discussed by the Federal Power Commission in its presentation? And, if so, what was its reasoning and what articulation do we have?

Mr. Jordan: I don't recall exactly in what context it was discussed by the Federal Power Commission, but I think the point is here that all three -- all four of the experts we have referred to here agree that you cannot look at a subsidiary, wholly-owned subsidiary, as a separate entity when it has a high debt equity ratio and when that high debt equity ratio is made possible by the fact that the parent has guaranteed the debt.

Commissioner Christian: I understand your argument, Mr. Jordan. Perhaps I didn't make my question clear. My question, specifically, was whether other regulatory agencies have had occasion to rule upon the argument that you are presenting to us here and, if so, what the rulings were and what the citations to the cases were?

Mr. Jordan: Well, frankly, we have not undertaken, in

this proceeding, to try to develop a history of what other agencies have done. As we said at the outset,we did not think it was appropriate to do that because this is a suspension proceeding and we don't think we ought to be putting on a full case with respect to the question of rate of return.

But let me tell you what one other expert has said in one other proceeding.

Commissioner Christian: May I take it that you either don't know the answer to my question or that the answer is no? I'm quite interested in the rest of your argument but I would also like an answer to my question.

Mr. Jordan: We have not undertaken to do a survey.

Commissioner Christian: That answers my question.

Mr. Jordan: There are 50 state regulatory jurisdictions and many of them have multiple regulatory bodies in them. Many of them adopt quite different approaches as the range is enormous. It just couldn't possibly be dealt with in something in the nature of a suspension proceeding.

Commissioner Christian: I hope that as this proceeding goes forward, then, if we do have an investigation, that all parties will develop this issue.

Mr. Jordan: I am sure that it will be developed. I think the proper place to develop it is in Ex Parte 308.

But I have mentioned four witnesses, four people who have proffered their expert opinion on this point. There is no

expert opinion on the other side on behalf of Protestants except one, and that one is Dr. Ileo. Dr. Ileo's calculations appear as an appendix to the protest of the State of Alaska.

Now, in March of 1977, Dr. Ileo was appearing as a witness for the staff of the Alaska Pipeline Commission in the Makisky Pipeline proceeding before that Commission, and he had occasion to discuss this very question of debt equity ratios. And think it is important enough,what he said there, that I read it to you. "It would incorrect, in my judgment, to treat Nakisky as if it were an independent company as long as it is fully owned by TeSoro. This is the case because all of the capital of Makisky was raised by TeSoro. Moreover, despite the fact that Makisky appears to be 100 percent debt financed by TeSoro" -- and here's the key language -- "it is truly financed by the consolidated capital structure of TeSoro, just as wholly-owned operating subsidiary of TeSoro. The fact that Makisky would never have been constructed without the financial backing of TeSoro, as reflected in the testimony of Makisky, clearly reflects this situation."

Now, he elaborates more on this on other pages. And his associate, as pointed out in the Exxon Papers, took a similar position there.

Let me give you a couple of examples of why this is important. You have been told about 93-7 debt equity ratios and even higher debt equity ratios, 90-10s and 85-15s.

Atlantic Richfield, on a consolidated basis, for example, it is the parent of Arco Pipeline, has a capital structure of approximately 64 percent equity. Not the kind of 7 percents and 10 percents, as you have been told about by Protestants.

Exxon shows in its papers a percentage of equity in its capital structure of approximately 71 percent.

Let's take these figures -- the only ones that have any real world economic significance -- and apply them to some of the numbers which have been quoted to you. The Antitrust Division talked about 58 to 68 percent return at 10 percent equity. Now, at 40 percent equity, below the figures I have just cited to you here, this turns out to be 14¼ to 17 percent rate of return on equity, not valuation, but equity. At 60 percent equity, this turned out to be 9.7 to 11.3 percent rate of return and at 70 percent equity, it turns out to be 8.3 to 9.7 percent return.

The Burueau, in its calculations, spoke of their alternative approach as affording a generous 20 percent return based on an assumption of 15 percent equity. But let's tinker with that assumption for a moment.

Let's assume the consolidated equity is not 15 percent but 30 percent; then we're talking about a 10 percent rate of return on equity. Let's assume that it's 45 percent; then we're talking about a 6 2/3 percent rate of return on equity. Let's assume that it's 60 percent within the range of the numbers I've given you. In that case, we're talking about a 5 percent return, assuming that you adopt the other elements of the Bureau's methodology.

Now, a couple of carriers involved here have applied the consolidated approach to the numbers that were furnished to the Commission to give you a better idea as to just how these things would come out if you applied that approach.

ARCO Pipeline, for example, used the overall Atlantic Richfield debt equity ratio of approximately 36-64, applied it to the valuation of the pipeline and calculated that portion of the valuation that was attributable to the equity of the consolidated enterprise.

Calculated that way, the rate of return on equity for 1978 came out to 12.2 percent. The rate of return for '77 through '81, which was the period for averaging used in arriving at ARCO's $6.04 tariff, came out to be 13.4 percent.

Now, EXXON, for example, as indicated at page 62 of its response, used Dr. Ileo's approach and applied it to their structure and came out with a rate of return on equity of 12.56 percent. So, the Commission has to understand that the numbers that have been cited to it just simply do not have reality.

You have to look at the consolidated financial situation of the pipeline subsidiaries and of parents. Now, the debt equity ratios of these companies are going to vary; they are not all the same, but you can do that.

Commissioner O'Neal: Let me ask a question here. It seems to me that -- okay -- the basic question here, really, is whether the parent companies -- whether anybody else, other than the parent companies, would assume the risk of financing this construction and that's the basis of the Vice Chairman's questions, I think. And you have cited some experts. Have the experts addressed that question, specifically?

Do we know whether anybody else would have financed this construction? Is this speculation? What is the basis for your arguments there?

Mr. Jordan: Well, the -- nobody was fighting for the privilege of coming forward to finance the Trans-Alaska Pipeline System [illegible], indeed, people --

Commissioner O'Neal: Did you seek any other techniques and go --

Mr. Jordan: -- other companies were given the opportunity to participate in the early days. A number of people were contacted. And there have been some changes and I think one company, Home Oil, dropped out at one stage but, except for that, it's been basically there have been changes in the names of entities and subsidiaries and so forth but, since the fairly early days, it's been basically the group that's involved here.

Commissioner O'Neal: Now, the group you're talking about are those who decided to build the pipeline. You're not talking about going to companies to financing houses or that sort of thing?

Mr. Jordan: That's right.

Commissioner O'Neal: You're talking about putting together this group to build the pipeline.

Mr. Jordan: That's right. And the financial experts that we've cited have all said that if you went to them, you couldn't do it with the kind of debt equity ratios we've talked about here. No one would purchase those bonds. The institutional purchases wouldn't touch them. Nobody in their right mind would accept the bonds of a pipeline company not guaranteed by the subsidiary.

Now, there may be a debt equity ratio point at which they would. Now, in the Ex Parte 308 proceeding, Mr. Gary and Dr. Solomon both considered the question of a proper rate of

return on valuation for so-called "minimum risk pipelines" and what they concluded was this; Mr. Gary said that 13 to 14 percent overall rate of return--not on equity now but on valuation--would be required to get the market to invest in a pipeline, a minimum risk pipeline.

Dr. Solomon said 13 to 13¼ percent, so the two numbers, the two ranges of numbers, are actually very close. Now, an important thing to note is that in arriving at these 13 and 14 percent figures, they used actually higher figures as applied to the equity portion. Mr. Gary used 15 to 16 percent but he assumed no more than 30 percent debt in doing that.

Dr. Solomon used 15¼ to 16 percent, but he assumed 25 percent debt in doing that. They then took the higher equity figures, averaged them with a rate of return which they thought was reasonable for a bond of this debt equity ratio and came out with these overall weighted averages in the 13 to 14 percent range. And these, of course, were perfectly consistent to the kinds of numbers I've been quoting to you, taken from the actual papers of the carriers here.

The other thing I must say -- and this gets back to the question which was raised earlier -- they both made it clear that they were talking about a minimum risk pipeline. What they're saying is, this is a flaw on rate of return. "We don't think you can finance any pipeline below this level

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because the market simply will not accept this rate of return. There are alternative investments that offer much better opportunities and nobody is going to suggest --

Commissioner O'Neal: In deciding whether a pipeline is a low-risk or a high-risk pipeline, what kind of things do you look at? I mean, here you have a supply of oil that is going to be moved out of the Prudhoe Bay area by pipeline. There is no other way of moving it. Doesn't that mean, as far as making money, this seems like a low-risk operation? Certainly, the construction, you know, entails some problems. But I'm trying to get a grasp here of what your criteria is.

Mr. Jordan: Let's assume for a moment that we call it a low-risk operation and let's start with 13 to 14 percent as a floor on a rate of return on valuation, again, not equity, for that low-risk, minimum-risk pipeline, that Mr. Gary and Dr. Solomon are talking about.

The risks involved, in any sort of oil venture of this kind, are very sustantial. There are enormous capital expenditures which have to be made.

Let's look at it right now. We have the oil. There is considerable difficulty with respect to the disposition of some of the oil.

You've all read the stories about the potential oil glut on the West Coast. Regulatory delays may well impose some difficulties in terms of transporting that oil. If it can't be absorbed on the West Coast, it's got to be taken somewhere else. How's it going to get there? The regulatory authorities in California --

Commissioner O'Neal: Do you have any doubt that you are going to find a market for this oil?

Mr. Jordan: I don't have any doubt that the combination of the ingenuity of the companies and the facing of reality, ultimately, by the appropriate regulatory authorities, would bring about some sense.

But as a businessman, looking at the situation right now, I would have a very nervous stomach, particularly if I was one of those who had an oil supply that was not matched with my refinery capacity on the West Coast and I did not have a guaranteed market.

Alaska is a very difficult environment. We can't look at this on the basis of the pipeline being built. We all know it got started on a test basis on the 20th of June. That's hindsight.

When you talk about what kind of rate of return must you get, you've got to look at this oil pipeline as it looked to the companies at the time we had to make the decision to go ahead. And that started back in the '68-'69 time frame, after the discovery of oil, in the early days.

They have suffered tremendous delays. That was an element of the risk. The risk that they could not get the permit right away and it turned out they couldn't get the permit right away. And it took an act of Congress to get the permit.

Then it turned out that they couldn't get the permit

without agreeing to very, very substantial environmental constraints and costs. I'm not arguing whether they were necessary or unnecessary but they were a fact of life. They increased the risk.

There has been discussion about the potential for sabotage. Certainly every effort is going to be made to make sure that there isn't any. But if there is and if that line has to be shut down, the company is the one to bear the risk of that. It's not really being borne by the consumers. It's not being borne by the government. It's being borne very directly by the companies.

This is not your average pipeline. One thing that makes it more risky, perhaps, than others, is the fact that because of the environmental restrictions, it was necessary to build a large percentage of the line above ground. That makes it more vulnerable to those who would likely use it as a ploy, in a terrorist plot, or what-have-you.

So, there are some risks here. The thought that this is a nice, smoothly flowing line that's already started up and seems to be working well -- and we all hope that it will continue to do so --

Commissioner Stafford: You speak about the minimum risk up there, supr[illegible] were just minimum or low risk, and you quote your ex[illegible]s as saying 13, 13-¼ percent rate on valuation, I believe that was. Well, then, if you were building

that pipeline in the lower 48, then, where does that come into the -- is that a minimum risk there or what risk level is that?

Mr. Jordan: I think it depends a lot of where you are building it and what kind of regulatory constraints you may be subjected to. If you are building it across flat country -- Texas or Oklahoma -- that's one thing. If you are going to build it across the Continental Divide, through mountainous territory with all the difficulties there, certainly that'll be reflected in the cost of building. But I think it also bears to risk.

If you have to start out and invest money and you are uncertain of what the regulatory situation is going to be, that is certainly something that has to be considered.

And the whole uncertainty in the world oil market is a major, major cloud that hangs over all investments in the oil industry these days.

Commissioner Stafford: Is there a considerable difference in what you're asking for here and, oh, say, on an average, what you're asking -- what rate might be in the present lines you have?

Mr. Jordan: Well, I don't think there is. I think the reason that there isn't is that for many, many years the pipeline companies in this country have had their earnings effectively constrained by the consent decree.

The consent decree is, of course, not a limitation on earning, it's a limitation on the rebates in the sense that you can't pass back dividends to the parent company in excess of a seven percent return on valuation. And that seven percent return is calculated using interest as an expense.

The companies that are involved in this project, by and large, are subject to the consent decree because it applied to one of their predecessors in interest or affiliated companies or, as Amerada Hess said in its papers, they have voluntarily undertaken, in effect, to treat themselves as constrained by the consent decree.

Let me give you some figures that relate to this rate of return on valuation calculated by several of the carriers in their responses here, based on the assumption that interest would not be treated as an expense. That's been one of the big issues here, the interest treated as an expense.

Now, this really just involves adding back the interest expense to the net income figure that's otherwise shown, taking this total and dividing it by the valuation. That's the arithmetic involved and it's not complicated.

In the EXXON papers at page 45, using this methodology

they cite a rate of return of 12.25 percent; Amerada Hess, in its alternative calculation at page 9 of its response, gives a figure of 14.34 percent; Sohio at page 19 of its response, shows a figure of 12.9 percent.

So, what I'm saying to you is that taking this pipeline, even though it is a risky pipeline, and taking the calculations right off the financials of the companies involved, and putting the interest back in and measuring that against valuation, you come up with numbers that are right within the range for that minimum risk pipeline that Mr. Gary and Dr. Solomon talk about.

So, I don't want the Commission to have the idea that when I say the Alaska Pipeline is a risky element, if you disagree with that and you think there's been a cushion put in there for the risk, the cushion isn't there.

I think that the rate of return that would be justified, in view of the risk, would justify return considerably higher than those that have been calculated here. Because of the consent decree and other factors, that's not what's happened and the actual rates of return on valuation are right in the range that Mr. Gary and Dr. Solomon have specified in their verified statements in 308 as being proper and reasonable.

So, I th[illegible] are several important things that the Commission ou[illegible] to understand this morning about this rate of return issues. First of all, the rate of return figures

based on the phony debt equity ratios simply cannot stand scrutiny and all the experts, including apparently Dr. Ileo who was here for the State of Alaska, seemed to agree that these debt equity ratios are phony and just have to be totally ignored.

This whole matter of rate of return does not present the Commission with a crisis. It does not present it with some situation which demands extraordinary action because the rates of return that we're talking about are not extraordinary rates of return. They are rates of return right in the range where you would expect to find them.

And that means, as far as the carriers are concerned, that there is no justification for the Commission thinking that it is required, because of the numbers in this case, to depart from the wisdom which was set forth in the Williams Brothers' case to the effect that 308 is the proper forum for resolving these questions.

The Commission can move ahead and let these tariffs become effective, as filed, and yet be assured that in so doing it is not permitting an unreasonable or an unconscionable rate of return; that is simply not the case.

Commissioner Clapp: You don't believe that the standard that the Supreme Court set out in the Hope case is a fair one for determining a reasonable rate of return? The court said in Hope, I think, that revenue should include service on

debt and the return on equity sufficient to attract capital. If you would --

Mr. Jordan: Well, that's exactly what Mr. Gary and Dr. Solomon have done in their calculations. They've gone at it slightly different. One of them is an investment banker and he's very sensitive to the market and he knows how the institutional investors feel. The other one is a professor of finance and his is, perhaps, a little bit more theoretical.

What they have done, in both cases, they have looked at the yield rates for high-grade corporate bonds. In some cases, they've looked at the capital "A" double little "a" type bonds and, in other cases, they have looked at the overall corporate bond market; then, they have added a risk premium based on the difference between bonds, which are obviously less risky than equity.

Now, in doing this, both of them, as I recall, went back to the 8 percent-10 percent figures which were set by the Commission in 1940 and looked at the corporate bond rates then and the rate of return on valuations that were allowed at that time, and they both concluded that the spread between the prime corporate bond rate and the allowable rate of return on valuation in those 1940 cases was comparable to the spread which they are talking about with this 13 to 14 percent rate of return on valuation.

What's happened, of course, is the corporate bond market

has gone up. All capital costs more these days. You know, the days of the two percent government bond have not been with us for a long time. And the days of the two and three percent corporate bond have not been with us for a long time.

These are real world factors, these are the things that the companies have to face. But I think that the approach that they are contending for is exactly consistent with that statement and it is based on a market approach. In other words, in a regulated industry, you have to look to the competitive economy to see what would happen there. And the goal of regulation is to try to emulate what happens in the competitive world.

You can't have it precisely because, by definition, it's not the normal competitive world. Certainly, pipelines are a lot more competitive than public utilities are because they bear a risk of loss and they don't have certificates of public convenience and necessity. But these experts have done that; that's exactly their approach and that's the way they derive.

Commissioner Clapp: Isn't there some danger in relying heavily, though, on the cases of the '40s. The Commission has had very few pipeline cases before it, several in the '40s, and more recently the Williams Case.

But in the '40s, the debt equity structure was quite different and the formula at that time provided a reasonable rate of return.

The Protestants, of course, are arguing that the debt equity structure is so different now as to cause us to discard that.

Mr. Jordan: Well, you don't have -- that's an approach which they have used as a way of comparing their results. But if you look at both the Gary and Solomon papers, you will find that their approach is not pegged exclusively to that differential in 1940 between bonds and the rate of return allowed by the Commission. They've gone at it with other approaches, basically looking at the corporate bond rate and trying to assess the risk premium that should be allowed for an equity investment over and above the corporate bond rate.

And in the case of Mr. Gary in particular, he has relied very heavily on his experience in the investment banking business. He's out there on the street, so to speak, every day, trying to bring [illegible]s and those who need capital funds together. That's the acid test. It's not somebody's theory. That's where the real test comes and that's his business and

it is his considered judgment as expressed in a verified statement in 308, that you simply cannot finance a minimum-risk pipeline the way investors view the market, without allowing 13 to 14 percent rate of return on valuation.

Are there any other questions?

(No response.)

Commissioner O'Neal: Thank you.

This looks like a pretty good time to break so we will recess at this point until five minutes after eleven.

(Whereupon, a short recess was taken.)

Commissioner O'Neal: All right, we're ready to proceed with the next witness.

Mr. Lansdale: If Your Honor please, I am John Lansdale. I represent the Ohio Pipeline Company.

I would like initially, Ms. Christian, to try to give you an answer to the question that you asked about the other cases that use the parent company as the index of return.

The answer is yes, there are loads of such cases. We'll be glad to give you some if you give us a chance to look them up.

But one of the outstanding examples of it is -- most of the state commissions, in dealing with subsidiaries of AT&T, for example -- the way that system is financed, the local companies float their own bonds on their own risk, but the equity capital is supplied by AT&T.

Therefore, the commissions look to AT&T's cost of equity capital in calculating the rate of return. And they do this similarly -- this most often arises in the telephone cases because they're almost the only utilities that are regularly regulated and have much of a holding company system anymore.

But, the reasoning of it is quite simple. The question of rate of return is a question of fact. And to find the fact, you look to what the investor does. The securities markets, the cost of money in the securities market is unregulated; it's true competition.

And when the experts get on the stand and say, "What is

the cost of bond money? What is the cost of equity money?", they go and look at the stock market and the bond market and see what the behavior is.

Well, if that behavior is governed by the investor's perception of Standard Oil Company, for example, as distinguished from Sohio Pipeline, then the only fact you have is what are they willing to lend money for or to buy stock in, in order to rate Standard Oil Company, not Sohio Pipeline Company.

Therefore, that fact relates to Standard Oil Company, not Sohio Pipeline, except as it contributes to the risk, or the productiveness, as the case may be, of Sohio -- of Standard Oil Company.

Now, for example, in this particular case, you can perceive this in operation, because if you will look at the responses, you will find that the interest costs of these several companies vary quite widely. Sohio's is among the highest, 9.3 percent average interest cost of the bonds that it sold to finance, in part, its portion of the pipeline.

Some of the others -- I forget what they are. ARCO, for example, is around 7 percent.

This expresses the investor's appraisal of the differences in the risk. And one of the reasons Sohio's is the highest -- I don't know whether it's the highest or not, but if it isn't, it's very close to it -- is because Sohio is a relatively small

company in proportion to the others that have large interests in Prudhoe Bay.

And therefore, the Trans Alaska pipeline system, the whole Alaska venture, as to which so much money has been put out, is very much larger in proportion to its total capitalization for Standard Oil Company than it is for any of the rest of the companies. And you'll find, therefore, this expression of the investor appraisal of the differences in risk.

And so, the reason why you look to the parent companies is quite simple -- because there's no other way you can find out what the true cost is. And when you go to the parent companies, you're looking at the investor's perception of a conglomerate of some kind.

Sohio, for example, is in the plastics business, and in the chemical business and the coal business. They look at all of these things.

So, the answer is yes, there are loads of cases that look through to the parent company for cost of money or capitalization or whatnot.

And when you look at capitalization, this ratio, you're looking at an index of risk, in any event, because the degree to which the risk is concentrated in the equity side, and the smaller the equity, the higher the equity cost; and the larger the amount of bonds, the higher the bond cost; the lower the amount of bonds, the lower the bond cost and the lower the

equity cost.

So, we will get you some cases on that; just give us a few hours to look them up.

Commissioner Christian: Thank you, I appreciate it.

Mr. Lansdale: Now, if Your Honors please, I want to comment for a bit upon what I think is the basic issue before this Commission.

I am assuming for the purposes of my argument that Your Honors have power to suspend.

And, the question is, what is the issue before Your Honors on the power to suspend or on the exercise of that power?

Now, obviously, you have to look at what you think prima facie about these rates. Does it look like they may be too high? Are you disturbed or startled by the cries of outrage from the State of Alaska and the Bureau of Enforcement and the like?

And, obviously, if you are, obviously if you think there may be a question about it, you'll order an investigation. And, having made that determination, that an investigation is needed, you have one more decision to make until you suspend. Shall you suspend or shall you, like some godfather, make us an offer we can't refuse and say, well, no suspend if you go down a little bit.

Well, I was pleased to see, I was handed this morning a reply brief from the Department of Justice. I didn't have a chance really to read it but I scanned it. And I was pleased to see that the Department believes that the problem before you is the same as the federal judge has when he is asked for

a preliminary injunction, because that is what I propose to you in our response. This is what I believe to be the thing before you, the kind of thing a judge must decide on a preliminary injunction.

Now, in a preliminary injunction, one of the thing the judge decides is what is the probability of success after you have a trial? Because if he thinks that the case has no merit whatsoever, he's not going to listen to you anyhow.

But, having made that decision, he's got one more decision to make. That decision, the probability of success, is precisely like the decision you must make as to whether you are going to order an investigation.

Now, the second question is irreparable injury. Who's going to be hurt if he lets things go on as they are until he can decide the case?

The question before you is, who's going to be hurt and how much and comparatively how much if you let things go on as they are while you decide the case, because I assume that you are going to listen to the evidence, that you're going to give consideration. Now, whether you do it in Ex Parte 308 or whether you do it in a proceeding here and how fast you do it is a matter that I'm not going to get into. I assume, in view of the amounts of money involved here, in view of the publicity that it has, in view of the public interest in it, you're going to move as rapidly as you can consistent with

making the proper decisions. And whether you do that in 308 cr whether you do that in this case, I hope, is irrelevant to the validity of your answer after you get there.

But, right now, you have to decide who is there irreparable injury to that is going to be suffered by somebody if you don't suspend the rates? Is there irreparable injury going to be suffered by somebody if you do suspend the rate? And, how do you balance those equities,if you can bring yourself to think of equities, in the case of very large oil companies and in the case of, what appears to me to be,one of the wealthiest states in the United States.

Now, if Your Honors please, there is no consumer that's going to be adversely affected by whatever you do here, either adversely or the contrary.

There is no purchaser of oil in the lower 48, there is no refinery, there is no automobile owner at the gas pump, that is going to pay more or less for the oil or the products of the oil, whatever you do here today or the next two days, whenever it is you do it.

This is an interesting economics situation because you are dealing, for all practical purposes, with a closed circuit, so to speak.

To facilitate the State of Alaska's argument about double dipping, I would even call it a pond without an outlet, in which you have eight or nine people contesting for how you

divide up this enormous sum of money that is there, pending your decision, pending your decision.

Now, if Your Honors please, the wellhead price of the oil varies dollar for dollar with the tariff. There is no question about that whatsoever. And that is the only effect, the only direct effect, of a change in the tariff, and that is a variation in the wellhead price of the oil. I'm talking about consequential effect. Of course, it affects the income of the pipeline companies and the like.

Now, in considering what is the effect of some temporary order, and this is what we are talking about. We are talking about a temporary order. Shall you issue an injunction pendente lite?

In considering the effect of this thing, you must not assume that all of the interest here on one side or the other are uniform. Although we have attempted to cut down on what is, I am sure, an extremely tiring proceeding to you by getting together and trying to divide up our argument a little bit, you must not assume that the oil companies or the pipeline companies are a monolith in this situation because they are not. The differences are quite major.

For example, the Sohio Pipeline Company has 33 and a fraction percent of the pipeline. Its parent company owns more than 53 percent of the oil. It's got to ship over other people's pipeline.

Similarly, Union, which owns a small portion of the pipeline -- one and a half percent or something like that I think -- owns no oil whatsoever. BP Pipeline Company, quite indirectly, an affiliate of Sohio Pipeline Company, owns 15 or 16 percent of the pipeline and no oil.

There are one or two pipeline subsidiaries that are relatively in balance, but the point I am trying to make is that whatever you do, the relationship and the effect -- the financial effect thereof is quite uniformand quite complicated

Now, there is one thing that is not complicated about this and it is perfectly clear that if the tariff is up a dollar, the wellhead value of the oil goes down a dollar. And, therefore, the one-eighth of the oil which the State of Alaska owns is worth a dollar per barrel less. And the seven-eighths of the oil that the producers own, the State of Alaska's 12½ percent, almost exactly the same as their royalty interest, their 12½ percent severance tax is diminished if the wellhead price is diminished, with one exception, however. They have taken the precaution of putting a minimum in there of severance tax of 80¢ a barrel and, if you'll use your hand-held gadget, you'll figure that this figures out to about $6.53 a barrel, which is the minimum wellhead price that the severance tax will be paid on. And I think that in the areas that we are dealing with here, the severance tax can be read out of it. Alaska is not going to be hurt about severance tax.

And, even if they are hurt about severance tax, they have provisions in their statutes which enable them to assess the wellhead value and any errors in the determination of it will be remedied in due course.

And I might add that the State of Alaska's legislature has neither been backward nor slow about looking out for Alaska's interest in their -- financial interest in this oil.

Now, there are very large sums of money here, but the number of interests are very small. And the major interests

pressing for a lower tariff interim is the State of Alaska. Now, the State of Alaska -- I want to get out of the way at the beginning the fact that I don't think that even the State of Alaska, which has not been notable, at least, for its restraint in its brief, will claim that it is going to suffer any deprivation whatever Your Honors decide.

To give you an example of the numbers that we are dealing with and the effect on the State of Alaska, in 1975, which is the latest which I could discover figures for, in the tabulations published by the Department of Commerce, the State of Alaska's total tax revenue was $203 million. If Sohio Pipelines' tariff is approved, or if Sohio Pipeline's tariff is the one that is in force, the State of Alaska's severance tax, alone, in the next year, 1977, will be $306 million, approximately, 150 percent of its total tax take from all sources, in 1975.

Its royalty, remember, is 12½ percent, it's severance is 12½, its royalty will be somewhat more, $308,790,000, if my calculation is correct. And, in addition to this, we must not forget that they have taken the precaution of imposing a 2 percent ad valorum tax on the pipeline, and we have corporate income taxes as well.

So,I think that it is reasonably clear that whatever Your Honors decide, Alaska is not going to suffer.

Now, I haven't mentioned the Artic Slope Corporation. They claim that if this tariff goes into effect and it turns out that it's too high, their payments from Alaska's share -- the payment of Alaska's share of the several hundred million dollars that goes to them under the Native Claims Act will be delayed, thus they will lose something for the time value of money.

Well, of course, their payment comes out of Alaska's royalties and whatever happens to Alaska's royalties, I presume, will pass through to the natives. And I have no reason to suppose that the State of Alaska will be less fair than the oil companies are asked to be in that respect.

Now, the question is, will the State of Alaska suffer deprivation? Of course, under the Interstate Commerce Act we have ample provision for refund. And the Exxon Company, in its presentation, proposed a provision for refund in its rule which appears at page 67 of their brief.

I'm authorized by the other pipeline companies to state that they are perfectly willing to insert such a provision in their tariff providing for a refund at 8 percent interest.

Commissioner O'Neal: Now, does this meet the argument that I think has been raised in some of the pleadings that while refunds might be available, there may be a question as to whether the pipelines would actually apply for the refund since the owners benefit either way. You say you feel the tariffs are taking care of that problem? -- the tariff provisions

Mr. Lansdale: I have -- the tariffs certainly would take care of that problem because the pipeline companies would be obliged to make the refund and I want to invite Your Honor's attention to Section 1 of the Restatement of Restitution which provides that anyone who is unjustly enriched at the expense of the other must reimburse, or restore, that to the other.

And I wonder if there is anybody here that believes that if royalties are paid on the basis of a value which is fixed absolutely, dollar for dollar, by the tariff and the tariff is later retroactively reduced and refunds are made, or whether refunds are made or not, is there anybody here that really believes that the State of Alaska will not gets its money back, or they really believe there's any way for the oil companies to hang onto that dollar profit -- for example, to get a dollar refund from the pipeline -- and then keep this --

Commissioner O'Neal: Are you assuring us there is no way they can hang onto it?

Mr. Lansdale: I am asserting that if there was any way to hang onto it, I don't know. I have advised my client, Standard Oil Company, that they will be obliged to refund that I can -- before Your Honor today are the pipeline companies, not the oil companies, and I can't speak for the other oil companies, but I can speak for Standard Oil Company and I have so advised them to that effect.

And it's my understanding at the present moment, discussions have been initiated between the State of Alaska and the oil companies as to the determination of wellhead values under the terms of the lease. And I am advised, indirectly, by the counsel who represent the production interests of Exxon, that they construe the lease to indicate that a retroactive adjustment of wellhead value would have to be made if it is necessarily retroactively adjusted by Your Honor's action on the tariff.

Now, this goes to contract law. I think, if Your Honors please -- and those of us who have some experience in the antitrust laws would have no doubt that the State of Alaska could recover under the Section 7 of the Interstate Commerce Act which says that "anybody damaged".

And Your Honors may recall that there are two cases in the Supreme Court of the United States which deal with the right of -- the damage right is called "pass-through". Under the antitrust law, the language of Section 4 of the Clayton Act is almost exactly like Section 7 of the Interstate Commerce Act.

And in antitrust law, the courts have held that the customer of he who pays too high a price may not recover; not because he's not damaged or may not be damaged, but because of the difficulties of proof, the impossible or almost impossible management of the litigation of the enormous numbers of

people involved in the consumer end of it. However, in both of those cases which made this decision, Hanover Shoe on the one side, on the defendant's side, and the Illinois Brick, just a few weeks ago, on the plaintiff's side, in both of those cases, the court pointed out that if you had a cost-plus situation, that would be different.

The guy who had the cost-plus arrangement could recover because he is directly damaged. And if you can think of anything more cost-plus than a situation in which the tariff is reflected, dollar for dollar, in the wellhead price of oil, I don't think there is much difference.

Now, the point I wish to make, if Your Honors please, is, what you are asked to do here by the Protestants, is to impose a lower rate, to say to the oil companies, "You can stop the pipeline if you want. But if you don't want to, you can file a lower rate."

Now, I don't care what circumlocution you use. The fact of the matter is that you will be dictating a rate to these companies. And what --

Commissioner Hardin: Mr. Lansdale, in the beginning of your statement you said you were assuming that we have the power to suspend?

Mr. Lansdale: Yes, sir.

Commissioner Hardin: If I understand your position correctly, and let me just summarize it for a minute, you are assuming we have the power to suspend on the basis of what is considered in the courts in the issuance of the TRO, which is that there appears to be some unlawfulness about it. That would be the basis for the power to suspend.

Mr. Lansdale: Yes.

Commissioner Hardin: Are you saying then that even though we have that power to suspend that we do not have the power to prescribe a rate?

Mr. Lansdale: I certainly do. I certainly do. Because if you prescribe a rate, you are not suspending, you are prescribing a rate. In the statute that Mr. Kilcarr, I thought

so eloquently presented it, the statute says you have to have a hearing before you prescribe a rate. You have to give the oil companies -- much as the State of Alaska would like not to -- you have to give the oil companies a chance to be heard on the facts of this thing. You have to have some sort of an evidential basis. Your own rules, as Your Honor please, provide that a hearing of this kind shall be informal, that there shall be no transcription, that there shall be no evidence, that nobody shall be put under oath. This is not designed to be an evidential hearing in which you decide what the rate shall be.

And if Your Honors please, I say to you, that you've got to decide, not what the rate should be , but what are the equities of the situation.

If you were a United States District Judge, deciding whether to issue a TRO or a preliminary injunction, you would be required not alone to decide whether it looks like something might be wrong but who's going to be hurt?

And I'm trying to say to Your Honors that if you succumb to the temptation to impose -- and I use that term advisedly -- to impose a different rate on these companies, you will have decided now and today or tomorrow or day after tomorrow or whenever you decide it, you have decided that whatever amount by which you reduce those things, is not going to go to the pipeline company. It's going to go to the State of Alaska and

it's going to stay there.

And there is no way, there is no way, that the pipeline companies can be made whole.

Now, if Your Honor please, we've talked about risk here a little bit. We talked about risk here a little bit and I've noticed a lot of language in the Department of Justice saying about the necessity to preserve inducements to explore in the State of Alaska.

Think for a minute, if Your Honors please, about the effect, the chilling effect, if you please, on the next guy that's asked to invest money to bring oil -- whether we have what the Department wants divestitured so we have pipelines standing alone or whether we have oil companies -- think what happens to the next fellow that is asked to invest in a pipeline in very difficult circumstances, to spend however many years -- it's taken several years and billions of dollars. The investment up there, if Your Honor please, is over $13 billion at the present time and not one penny has been taken out by the oil companies. The State of Alaska got $500 million from advanced severance taxes and $950 million from selling leases. But the $13 billion investment that's already been made has not made a penny of it.

Now think for a minute, Your Honors are asked to say now, today, the State of Alaska shall permanently get an extra dollar, an extra two dollars, depending on whose brief you

read,or an extra three dollars for every barrel of oil, which they will get to keep and there's no way, there's no way, for the pipeline companies to get that back.If Your Honors, after listening to the evidence, as we believe you will, decide that these tariffs are approximately right -- there's no way for us to get that back.

And if Your Honors please, if you let the situation stay like it is, if you let it stay like it is, the economic interest will be and can be readjusted so that nobody is really hurt.

And the only reason I went into this business of how much money Alaska is going to take out -- and, believe me, they're going to be rolling in it -- there's no way -- the reason I went into that was because there is no possibility of anybody getting hurt because they don't get their money for a while.

And I submit to Your Honors that it is not only illegal, it would be immoral for Your Honors to sit here and to say, take two dollars, or take one dollar, out of the pockets of the pipeline companies and give it to the State of Alaska that is already going to get two or three times their recent tax take, temporarily, because of these unsubstantiated -- in the briefs and in the efforts to get Your Honors to change, instantly, your method of regulation. There is no moral or lawful basis for you to do this thing to these companies and think what the next fellow who's asked to invest money to get

oil out of the Arctic or out of some other difficult place is going to think about, if you do so, when they're asked to invest $13 billion before they get a dime out of it, to be met at the very moment of fruition with a demand to give a dollar or two dollars to the State of Alaska on the supposition that these unsubstantiated claims might just be true.

I submit to Your Honors that you should not do this.

Commissioner Clapp: Mr. Lansdale, you don't think the power to suspend implies the lesser power to suspend without predudice, is that correct?

Mr. Lansdale: Oh, I think it implies the lesser power to suspend without prejudice in a case in which the one who is the recipient of this order has a real choice.

You may recall that in this Chesapeake and Ohio case, just decided last year by the Supreme Court, where you did put a condition of investment of the use of the money, and by a divided court, the Supreme Court approved this thing.

And they approved it because this was in furtherance of the status quo, and that is to say in the public interest, because if the companies didn't need this money for rehabilitation and refurbishment, then by definition under your decision, they didn't need the money.

And so, to protect the abuse of the public interest, you had the power to do this, and so the Court held. But I wish to point out, in that case, that the Court also pointed out that Chesapeake and Ohio didn't have to do this. All they had to do was wait seven months and put it in. So that, they had a real choice. We have no choice in this case.

If Your Honors please, if this pipeline is stopped, you're going to have an 800 mile cannon. And what would the State of Alaska do about this?

Now, why should the economic burden of succumbing to this

difficult choice be on the oil companies? The State of Alaska has a stake of 12½ percent royalty and 12½ percent severence tax in this. They have the biggest single, I think, economic stake in this thing, except Standard Oil Company.

And I submit to Your Honors that we, having made the investment -- now one way Alaskans can protect themselves, by the way, is to buy a piece of this pipeline. And I'll bet you that if they want to put some of that cash on the barrelhead, I can arrange a sale.

(Laughter.)

Commissioner O'Neal: For planning purposes, let me point out that the pipeline's time will run out at 11:57. I think we would like to have one more witness after that before lunch.

Go ahead and proceed.

Mr. Schwartz: Union Alaska will be very brief, Mr. Chairman. May it please the Commission, my name is David Schwartz. I appear today on behalf of Union Alaska Pipeline Company, one of the owning TAPS carriers who have been erroneously characterized by all of the Protestants.

Union Alaska and its parent Union Oil Company of California do not own any crude oil production capacity on the North Slope. And direct and indirect allegations to the contrary are simply untrue.

In addition, Mobile and Amerada Hess, also, have pipeline capacity in excess of their production.

The fact of our non-ownership of North Slope crude production gives rise to two very important facts which we urge the Commission to take into account.

First our entire investment of $144.2 million in TAPS must be supported by revenue from unaffiliated shippers on Union Alaska's pipeline capacity. And our rate of $6.09 has been kept to the lowest possible minimum to attract such traffic. To repeat, we have no North Slope crude production operations. Thus, the allegation that producer-owners can somehow recoup revenue has no arguable applicability to Union Alaska.

Second, I would like to turn to this pejorative double dipping argument of the state as to interest expense. In our view, if this is adopted, it would guarantee that no

corporation would ever invest in a pipeline again.

Let me give you an example of how this would apply to Union Alaska to illustrate the ultimate absurdity of the position. If today Union Alaska were to seek to borrow 100 percent of the capital it invested, that's $144.2 million, to finance the project at a 7 percent interest rate, and were to invest no equity capital, the effect of the state's approach would be to allow us no net income.

Now, if one were to use a more realistic figure for long-term financing of 8 percent or higher, Union Alaska would end up in a loss position.

I respectfully suggest to this Commission the state's approach is not the type of economic incentive to encourage private capital's assistance in dealing with the energy crisis or to improve this nation's transportation system.

Now, this is particularly true in the risky area of oil exploration. Union Oil has spent $100 million in unsuccessful North Slope exploration -- a $100 million. If that doesn't constitute risk, I don't know what does.

Now, this Commission is fully aware of the role that incentives for private capital can play in transportation. You recently exercised forthright leadership in this regard, in Ex Parte 25[illegible] in guaranteeing incentives for per diem payments on go[illegible] cars and, in Ex Parte 327, dealing with capital incentives in railroad ratemaking.

Union Oil urges that the Commission recognize these hard facts of economic life. We urge that you allow these lawfully constructed rates at issue to become effective with publication of a contingent refund provision, including interest.

Thank you.

Mr. Vickrey: Mr. Chairman, I am the last lawyer for the pipeline companies. I have about ten minutes. Would you like to hear it now or after lunch.

Commissioner O'Neal: No, we would like to hear it now, yes, and we will hear from one of the other Protestants witnesses before lunch, that's the point I was going to make earlier.

Mr. Vickrey: Mr. Chairman, Honorable Commission, this is a very unusual case. The only Protestants --

Commissioner O'Neal: Could we have your name for the record, please?

Mr. Vickrey: I'm sorry, sir. I'm Jack Vickrey; I represent BP Pipelines, Inc.

None of the Protestants are shippers. The only Protestants who claim an economic interest are the State of Alaska and the native group who claim that high tariffs will discourage exploration in Alaska.

I believe it's been adequately shown that the tariff rates will have no effect on the delivered price of oil which will be set by competition from foreign oil. Therefore, you don't have an interest in the public as you usually do in a suspension case.

Interestingly enough, the Protestants don't try to suspend these rates on the ground that they are out of line with the industry standards or the ICC regulations, but they

say that the ICC standards that they've been applying for all these 70 years are all wrong. And this is, in effect, an attack upon the Commission's practices as much as it is these tariffs.

The application of the public utility FPC tie-up rate of return on equity concepts is not only inapplicable here but it reflects a total lack of understanding on the part of the Protestants of the true nature of the oil pipeline industry.

I read in the Oil and Gas Journal the other day that the Federal Power Commission intends to transfer 1455 people to the new Department of Energy. I noticed the ICC will transfer only 17 people. I think this reflects somewhat the relative health of the two industries, the oil and gas industries.

The highest rate suggested by any of these Complainants will not even permit carriers to earn enough to pay their debts during 1977. And if there is a slight deviation in the estimated throughput, this would include the period of 1977 through 1978.

Under their return on equity theories, a pipeline like the TeSoro in Alaska, which has 100 percent debt, would be entitled to a zero rate of return because they have no equity.

Before this Commission discards its present regulatory procedures, I think it should first review the condition of the oil pipeline industry today. There are now 220,000 miles of oil pipelines in this country, all built by private capital

without government subsidy.

The Transportation Association of America reported recently that oil pipelines transport 23 percent of the intercity freight tonnage at a cost of only 1.3 percent of the nation's freight dollar.

During the period from 1947 through 1974, the average revenues per ton-mile for all pipelines increased only 8 percent, while the consumer price index rose 121 percent. It's highly unlikely that the oil pipeline rates would remain stable during this period of inflation if they had been regulated on a FPC cost-of-service basis.

Anyone who has paid a gas bill lately knows this. The Independent Petroleum Association of America, who represents over 4,000 independant oil men, told Congress recently that it knew no producers who had any difficulty in moving their crude.

The oil pipeline industry has been able to achieve this because both Congress and this Commission have recognized that oil pipelines are a unique form of transportation and should not be regulated under utility concepts.

Oil pipelines are wholly unlike public utilities. They do not have exclusive franchises, must compete with other pipelines and other forms of transportation such as truck, tankers, barges.

Oil pipelines are high-risk, capital intensive ventures that are built to serve specific needs. They operate in only one direction, and they cannot be moved to new locations very easily.

For these reasons, experience has shown that no one is interested in investing in an oil pipeline except the oil interests they serve. Proof of this, I believe, Mr. Chairman, is shown in some of the documents filed by the AOPL in Ex Parte 308, that 95 percent of all the crude oil pipelines in the United States move through shipper owned lines.

The other 5 percent who are independently owned -- most of those, like Buckeye and Williams Brothers, originated by oil company ownership; they were built that way.

So this is proof positive, I believe, that there is no ready market for oil pipelines in the general investment field.

There have been several attempts through the years. I can remember the American pipeline and the U. S. pipeline, where a group of promoters tried to promote an oil pipeline. All of them failed because of lack of financing.

All of the new pipelines that have been built within the last decade have obtained their capital by throughput

agreements or by direct guarantees from their owners. Without these guarantees, capital simply could not be obtained. And because of these financing practices and the nature of the business itself, debt equity ratios are meaningless in all pipeline regulations.

Capital obtained by throughput committments or guarantees are really the equivalent of equity, according to Mr. Gary, who has been quoted before.

Any attempt to measure the capital structure of BP pipelines, whom I represent, whose entire capital was raised from its parent by either capital contributions or guaranteed debt, is a distortion of regulatory practices.

Capital to finance the Trans-Alaska venture could not possibly have been raised by independent investors if you had utilized a 45-55 debt equity ratio such as is common in the gas industry. The owner companies had no choice but to guarantee the debts to finance this system.

Now, to penalize these owners who put their credit on the line, by applying return on equity concepts for the first time by this Commission in a pipeline case, in a suspension proceeding without a full hearing, would be unconscionable.

I agree with the counsel who preceded me, that this Commission lacks the power to extend initial rates for a carrier that has no other revenue. To suspend and dictate a lower rate in a suspension proceeding would constitute

ratemaking.

To suggest that this Commission would engage in a sham proceeding to coerce a lower rate slanders the integrity of this Commission.

Commissioner O'Neal: Thank you.

Mr. Shibley: Mr. Chairman?

Commissioner O'Neal: Yes?

Mr. Shibley: I am Raymond Shibley, and I represent Phillips Alaska Pipeline Company. And I wonder if I might have 60 seconds just to state the position of Phillips.

Commissioner O'Neal: I think you might have 60 seconds. Fine.

Mr. Shibley: May it please the Commission --

Commissioner O'Neal: Can we have your name again for the record?

Mr. Shibley: Shibley, S-H-I-B-L-E-Y.

The Reporter: First name?

Mr. Shibley: Raymond. I'm representing Phillips Alaska Pipeline Company. I just want to underline a request that we have made in our filing for, in effect, joining Exxon in requesting authorization from the Commission to permit amendment of the tariff proposal for a provision for repayment of any amount that this Commission finds to be in excess of just and reasonable rates.

We have made the request without provision for interest,

but we would be agreeable to the Exxon proposal for 8 percent interest.

We strongly urge that this procedure be adopted by the Commission in lieu of other possible sanctions or proposals, simply because it is more practical, and because it is fair, and because no one will be hurt.

In this manner, the status quo will be preserved by the Commission, while the investigation and hearing is proceeding.

For purposes of this presentation, we are assuming the Commission does have the right to suspend, but not the right to prescribe interim rates. And in this manner, all parties can be protected, including the State of Alaska.

Thank you.

Commissioner Stafford: Did you say 8 percent? That you agree to 8 percent?

Mr. Shibley: Yes, Your Honor.

Commissioner O'Neal: Thank you.

Now, for the Protestants.

Mr. Cleary: If it please the Commission, my name is John Cleary, and I represent the State of Alaska.

I have asked that there be distributed to the Commission a series of oral argument exhibits. I recognize that Mr. Flynn posed an objection to them but I think they are acceptable and I ask that they be utilized.

I also have a larger graph which is here in front of the stand. I ask my associate, Mr. Toomey, to set that up so that maybe the Commission can see that also. It is a reproduction of the first page, which is the Protestant TAPS Rates Graph, separating the individual tariffs in cents per barrel by their different elements.

Commissioner O'Neal: Mr. Cleary, how much time are you reserving for --

Mr. Cleary: I would like to reserve fifteen minutes but when the green light goes on, if I have anything else, I may use a little bit of that time. I take it the green light will go on at five --

Commissioner O'Neal: When you have five minutes left.

Mr. Cleary: One of the reactions I have here coming this

morning and I had it before is, there is a strange feeling of deja vu. Yet I have difficulty following the carrier contentions. At one point they are saying you must penetrate to the parent company and look at the parent company for the cost of capital or the capital structure. And at other times they are talking about, don't change any rules, and they want to talk about using a valuation base because you cannot change any rules and the rules that you have followed at this Commission -- and I must say, as you well know, I have challenged some of those, as was pointed out this morning.

We have challenged the valuation rate base in proceedings at this Commission. But the rule as it now stands is that a valuation rate base is what the Commission uses.

But the TAPS carriers display an arrogant insensitivity to the mandates of the law. They distain the Commission's power to prevent unlawful carrier acts, at least when the unlawfulness is manifest in initial pipeline rates.

I submit that these rates are clearly, manifestly, unlawful, under the Commission's present standards.

The TAPS carriers' contemptuous assertion that the ICC does not have authority to suspend definitely brings back a feeling of deja vu, which was emphasized this morning when counsel used t[illegible] "let's make this perfectly clear".

We are to [illegible] the oil pipelines are above and beyond the law that would prevent others from acting unlawfully. In

asserting that the ICC cannot suspend, the implicit assumption is and must be, that the predicate to that position is, regardless of how unlawful the initial rates might be -- that point adequately made and very perceptively made by Commissioner Hardin -- that suspension power exists to enable the Commission to prevent unlawfulness. That power is not limited only to situations where an existing rate is being changed.

The Section 15-7, powers of the Act, clearly permits and indeed require the Commission to suspend.

The pipelines are coming eyeball-to-eyeball with the Commission. They are telling the Commission "you have no power". I believe that is one of the quotes. And I believe the implicit threat in everything they say is, of course, that they will be in court.

Whatever you do, if you put an order out, they're going to take it court. And I suggest, perhaps, the courts are the ones to decide the matter, whether or not to resist that power.

Commissioner Hardin: Mr. Cleary, could I ask your opinion on a couple of things here just for a few minutes?

You state that you do believe we have the power to suspend initial rates. Now going back for just a moment, Section 216(g) contains a grandfather clause. That grandfather clause reads this way, that this paragraph shall not apply to any initial schedule or schedules filed on or before

July 31, 1938 by any such carrier in bona fide operation when this section takes effect.

Now, it seemed to me in reading that, that there would be no necessity for a grandfather clause to say that this paragraph shall not apply to an initial schedule filed on or before July 31 by any carrier in bona fide operation when the section takes effect, if we did not have the power to suspend initial rates.

Now, if we look at it in that light and we look at Part 3 and Part 4, we find the same grandfather clause is in there.

Now, it seems to me that the intent was and that the feeling was, up to that point, that this Commission does have the power to suspend initial rates. Now, this says "carriers in operation prior to" that date. If you have a new carrier, then we would still, it would seem to me, have the power to suspend those initial rates.

Now, would you give me your comments and opinion on it?

Mr. Cleary: I could not say it more eloquently. I would just agree that the Commission does have the power and I believe the Commission has exercised the power for many years which perhaps is strange that we do have pipelines coming here. Perhaps, for many of them, they think it is the first time they have been before this Commission. I don't think it is case, because we have at least five of them who have been regulated carriers for a long time. They know the rules.

The other ones are coming in and their companies are related to oil companies. They know the rules. I just find it a little bit farfetched that they claim that the Commission really doesn't have the power. But I say you do have the power and, at least, exercise it.

They are going to go court. Let the courts tell you what your powers are. And I suggest that, if there should be such an erroneous interpretation of the law, contrary to Commissioner Hardin's view and contrary to mine, that there is a lack of suspension, we better find out about it and make sure that unlawfulness can be stopped. And I always thought it could be stopped by this Commission.

Now, they keep saying we are asking that the rates be prescribed or set. We are not. We give an argumentation that shows that the rates are unlawful in certain degrees.

Now, in fact, had the carriers decided to read the law a little bit more carefully -- and I haven't heard much of

the cases of this Commission cited today. They have gone off into theories of irreparable injury,and court arguments and that sort of thing. Irreparable injury is not a criteria within the question of suspension except under the recently enacted questions of the 4-R Act in power over the railroads. But it took a specific Congressional amendment to say that we now, in connection with railroad suspensions, have to have an affidavit and an affirmative complaint alleging irreparable injury. It took Congress a year ago to do this. Obviously, it has never been a part of this argument before.

I do not, in any way, diminish the fact that there is irreparable injury. I have reached that point.

Prevention of unlawfulness is the subject and purpose of the Commission's suspension powers under Section 15(7). Where there is a prima facie unlawfulness, the tariff should and must be suspended.

Alaska submits that there will be irreparable injury, one to the public interest, generally, whenever there is something unlawful. Two -- and, specifically, to the public interest, generally, by retarding the development of known petroleum reserves. I am reluctant to quote again and I don't think I will, but I will paraphrase Mr. Patton. I quoted him in the protest. It was a speech he gave in Los Angeles.

He was talking about additional cost caused by the environment, and he said someone is going to have to pay for

these, and that everybody knows. And that's what we are talking about. Everyone is going to have to pay for the cost of this pipeline.

But he emphasized another fact that there are additional problems because the higher the cost -- and he was talking about these additional environmental costs. The same thing applies to the excess earnings that might be flowing from them. To the extent there was additional cost, not necessary, this retards the development of no natural resources. And that's what we are talking about.

This does have an impact. And I submit to you that the whole story hasn't been told yet as to the effect of the pricing of Alaska North Slope oil on the domestic pricing in the lower 48 under the Congressionally mandated maximum limitation prices.

So, there is a public interest involved. But this Commission is on the transportation standard. It has always recognized that. You are not trying to allocate markets of petroleum or anything else. You are paying attention to the transportation standard and that's what the statute calls for.

So, the public interest is definitely being adversely effected by discouraging applications and investigations for new oil by other than the club that owns them -- owns the pipeline.

Union e[illegible] it is just a pipeline. Well, I submit that there must be some interest in there that they hope to

get in attacting, at least, some people who will be maybe other than those who do own the pipeline, who will be very closely tied to their parent company.

There will be additional irreparable injury to the petroleum cost borne by consumers, in particular, because the high TAP's tariffs will depress the wellhead price of Alaska North Slope oil, thereby resulting in or leading to an increase in the price of other domestic oil under the average ceiling prices.

Suspension of the rates does not mean the consignment or the suspension of service. That has been threatened. Sohio, at page 3, they say that there will be a suspension of service. Here we come eyeball to eyeball. Apparent tenacious pipeline refusal to publish lawful rates, or to provide lawful service under lawful rates cannot empower those carriers to refuse their common carrier duties.

In my 20 years before this Commission, I have never heard such a high-handed approach as evidenced by these so-called common carriers. They have threatened no service on the transportation of a vital national resource unless they get their tariff.

They try to intimidate not only the Protestants but the Commission, itself.

Commissioner Hardin: If their rate is suspended, what rate would apply?

Mr. Cleary: They would go back, under the standards, and publish a lawful rate. And I submit to you, they will follow and find the lawful rate by reading the Commission's decision. The Commission's decisions and all the Commission need say at this point is, "We suspend these rates", and give the reasons that are usually articulated, give a little bit more.

Now, let me turn to some phraseology and I'm going to lead right into my argument.

Commissioner Christian: Mr. Cleary -- before that, I'm afraid you didn't hear my question. My question was, what happens if they don't? Suppose the Commission issues a suspension order without prejudice to a lower right?

Mr. Cleary: They'd have exercised --

Commissioner Christian: The oil companies know what rates they can file without suspension, but they don't try.

Mr. Cleary: And that's apparently what they've threatened to do because they say, "We will file", or maybe they say, "We're being coerced".

Commissioner Christian: Then what happens?

Mr. Cleary: Well, it's their total free judgment as to whether or not their economic self-interest is to file something that would be lawful in keeping with the Commission's standards and, therefore, permitted to become in effect, or whether they stand there eyeball-to-eyeball and litigate

through the courts or whatever else they're going to do, and say, "We will stop the oil from flowing", and in the wonderful phrase of Mr. Lansdale, "that we have a large cannon in Alaska", I think that that's not a likelihood. And I don't think it means coercion.

When the Commission says, "All we are saying is this rate is unlawful that you follow and filed on", that is lawful. And we find that it is unlawful to the extent the rates would produce an annual return in excess of 8 percent upon the value of their property used in the transportation of crude oil, of crude petroleum oil, by pipeline.

Now, that is a prevailing quote --

Commissioner Christian: Before you get to another point, Mr. Cleary, I thought you were leading up to another argument so, since you weren't, let me lead you into it.

When you talked about common carrier duty, I thought you were leading up to some sort of contention that if the pipelines failed to refile at a lower level, that the Commission would have some sort of authority to compel them to honor their common carrier duty. You weren't making that argument?

Mr. Cleary: I haven't pursued that. I think there would be a right in the Commission but, perhaps, more so in the federal gove[illegible] failure to meet obligations under the lease. [illegible] obligated to be common carriers. Perhaps that is one of those contract law questions under the

right-of-way lease; that they are ready to go, that they will filled the line sometime by the mid-to-late July. They will be ready to start performing transportation services at that time and then they say "We don't have a tariff because our tariff has been suspended". The next, of course, implicit beyond that, is "And we have refused to follow the guidelines of the Commission and file one that would be lawful".

Commissioner Stafford: What would be a tariff, then, that they could file?

Mr. Cleary: A tariff that would produce an annual return no more than 8 percent upon the value of their property used in the transportation of crude petroleum oil by pipeline.

Commissioner Stafford: Are you agreeing with what they say the value of the property is?

Mr. Cleary: For the purpose of this point and at this point the valuation that is being used is a waiving of the original cost and cost of reproduction made at the first day, as if it is 100 percent brand new.

There is a difference, and it's an unfortunate difference, between such a value and the cost of construction. I want to make it clear, and I will make it perfectly clear, that the State of Alaska has not argued in this protest that you should try, at this point, eliminating any of the expenditures which might be characterized as unreasonable, or in excess of what this statute mandates, the expenditures under, quote, "honest,

economical and efficient management". That's the standard that will be applied in the hearing.

We're not asking that you lop off any particular amount at this point. All of our argumentation, all of the assumptions have been that every penny that these people claim to have laid out, including the interest during construction, including a failure to recognize the tax savings that oil parent companies have had for at least three years, which they report to the SEC -- and I've heard not one word of it today here -- including all those monies that they have spent and the tax benefits of them which have current value, we are not asking that one penny of that be eliminated.

We do object to the valuation, because under the Commission's formula, you take the original cost, which the formula says is $9 billion, 280 million, as I understand the figures used by the Commission's Bureau of Enforcement -- which I believe were merely provided them by the Section of Valuation or the Bureau of Accounts -- the number would be $9 billion, 280 million for the original cost. That includes everything.

What does the Commission's formula say this thing is going to be used for a rate base as? $9 billion, 747 million -- right off the start, the Commission's formula throws in an extra 6 percent. That's what I've been arguing about with this Commission for 10 years.

I don't think it's right. But for the purpose of this case, let's stick with the standard.

Last December in the Williams case, this Commission said, "Consistency and fairness requires us to adhere." They would not deviate. The entire Commission would not deviate from its standard. And that was the standard used.

What was that standard? The oil companies know it. They know what the standard is. They never once mentioned the gathering rates case. They never once mentioned the Readers Pipeline Rates and Gathering Charge case, the Petroleum Rail Shippers Case.

They mentioned Williams, because the Commission did reaffirm that they would not deviate in the context of a

particular case. We will hold that for Ex Parte 308.

But let's talk about that standard, and the language I use. And I say the Commission can suspend the usual, it further appearing that follows right before it -- behind the recitation of the tariffs. The next paragraph in the suspension order, it further appearing, cause to find it would be unjust and unreasonable.

Now, you can go on. I don't think you have to. But apparently, they need some education as to what the law is. And so, if you do go on, we could say "unlawful to the extent the rates would produce an annual return in excess of 8 percent upon the value of their property."

If you look at the chart that we worked out, you go to about the fourth page. I have a schedule in there. But it would be the total TAPS revenue, providing 8 percent return on valuation. Allow all the operating expenses. Account for 93 cents a barrel, other than depreciation.

Depreciation is, of course, an operating expense under the Commission's accounting rules.

Allowing for that, on a 25 year basis -- and we disagree with the 25 years, but even then, that's 84 cents -- total operating expenses are only a dollar, 77.9 cents -- $1.78 to operate the line. That's an operating ratio, an operating ratio in the 20's.

That ought to immediately get people of this Commission

thinking, "An operating ratio in the 20's, that's pretty good". Admittedly, there's a large capital investment, so you look beyond.

Well, the Commission has said 8 percent return on valuation; that would be $1.78. And if you do include taxes -- and I disagree with that. And I argued so in the Williams case. The Commission never, up until the Williams case, had imputed 48 percent tax rates. They did it in that case, in my opinion, without much rational explanation.

The national area rate case was decided from the Federal Power Commission just a week ago, a little over a week ago, by the United States Court of Appeals here in the District of Columbia. They upheld the Power Commission deviating from its practice of not imputing taxes. But they did so because there had been a very well articulated rationale and reasoning.

There has been none, so far, from this Commission as to why, at least in the case of pipelines, we're going to flow in a gratuitous allowance for federal income taxes.

But we calculate it in. We've added it in to this calculation. It's all right; it's in there. We think you better look at what it really means in terms of the economics of it.

We think you should look at such things as the Exxon pipeline floatations of-- or, support of bonds underwritten from the City of Valdez, little circular. They have to tell the Securities and Exchange Commission about deferred taxes.

We used some of those numbers, in our calculations for Dr. Ileo, when he made specific calculations.

About 5 percent of the capital of Exxon pipeline, as of last December, was in the form of deferred taxes. That means that it's a tax free loan, cost free loan, interest free loan, a deferral. It has a current value, it has time value.

The oil company parents, through the use of consolidated tax returns, have been using these since 1969, I believe, some of them -- certainly since 1974 -- which gets me off on a little tangent.

The pipelines -- I guess, today, I guess they're recognized and they are subject to jurisdiction. They have been telling this Commission for a long time, and not subject to your jurisdiction, or some in question at least, including such as Sohio and ARCO.

If you look in your own annual reports to the Congress, if you look in your own transport statistics, you've been reporting them for years. And curiously enough, the numbers that you have in those transport statistics have recorded the investment in Alaska as part of a measure of the return.

I don't think it makes much sense. I would call that -- maybe the pipelines terms that they have used towards some of the calculations -- "phoney capital structure". Well, it's a phoney investment. You put money in an investment before there's any revenue being generated -- it's a misleading number. But there it was.

What it shows, though, is that the pipelines have been subject to I.C.C. jurisdiction so we take this 8 percent return which is the standard. The Commission clearly stated it some time ago, back in 1940, in the reduced pipeline rates and gather and charge case, that return of 8 percent will give $1.78 a barrel.

You add that, the total revenue need, after allowing taxes as computed to be 21.7 cents, a rate of $3.87; that would be on the average. The average rate that the State of Alaska had computed admittedly using what we think is appropriate, analyzing the original cost. Don't start throwing in this gratuitous 6 percent because we are against that value base.

It leads to inflation; it has led to inflation and what it leads to is high rates that would permit someone, if there would be an idea of selling a pipeline under the law or because someone decides to profit from the sale, of capitalizing parent income streams. Exactly what happened in the Williams case.

You had a pipeline that had an original cost of $184 million. It had already been half depreciated and only had a net book value of $91 million -- or excuse me -- $83 million. $91 million worth of depreciation had already been recovered.

It was sold. Why? Well, I guess someone thought they would invest in pipelines. The person who has invested in

that pipeline has continuously reported to this Commission and said, "We are an independent line. There are no ties. We don't have any throughput agreements. We don't have any guarantees".

They paid $283 million for it, $283 million. That's what happens when you use a valuation base. That's why we against it. But the first year, valuation and original cost are basically the same. And as the other side has said, let's not discuss that here. That's for 308.

I do wonder -- the Administrative Law Judge has said that Ex Parte 308 was not a judicatory proceeding. There will be no discovery, which was affirmed by an order of Commissioner Hardin.

These people talk about on the hearing records. I don't know how they are going to solve those problems and get what they think is a proper day in court. I do say that all of the witnesses they've quoted, so far, were witnesses from 308 who have not undergone cross-examination.

The pipelines didn't submit anything in the initial round. There has been no opportunity to respond to their documentation and whatever the witnesses have said, and I would like to respond one additional point at this -- use a little bit of my time to the reference to Dr. Ileo who is here in the courtroom

I've asked that the transcript of the Makisky hearing

be brought to my table and it's sitting over here. And I welcome anyone from the Commission to read them in their entirety.

In the response to the protest, the word "disingenuous" was used, attributed to some of the Protestants. I suggest that quoting Dr. Ileo so far out of context that it's just incredible. If they read that entire transcript, it would make it quite clear that What he was talking about was a company where there was no separate identity, there was no separate debt, which is not the case with these companies who are a floating debt to the public and offering it through SEC filings; they are separate corporate entities.

It is interesting, of course, that they want to disavow the criteria of the Commission other than the valuation. The Commission's standard and criteria was 8 percent on valuation. It was a firm and reduced pipeline rates and gathering charges in 1940; reaffirmed in Petroleum Rail Shippers in '41; reaffirmed, again, in the Minnalusa Case in 1944; reaffirmed, again, in the reduced pipelines' further hearings in 1948. In Williams, I know that language rather well because I love the consistent and fair standard and I am calling it to mind, because it is very important, the consistent and fair standard of the Commission applied in that case -- let me get my quotation here.

In passing, I note here in my file, INS-9089, a subsequent decision by Judge Dowell, where he reaffirms. He said he couldn't deviate from it. I refer also to the K-9 Case, where Judge Nacy pointed out that the 7 percent -- Department of Justice consent decree is no ICC standard.

I would say that, in passing, whoever calculated numbers upstairs fed them through the legislative office and happened to go Hungate Committee in the Stafford-Hungate correspondence, that is what the pipelines rely upon is the history of their standards. They picked up correspondence and attachments to a letter to Congress which immediately turned out to be wrong. They had to be corrected substantially. There were no footnotes as to what was meant by these words "return on investment".

What investment were they talking about?

It took an accountant, Mr. Geeter, to go through and analyze and see what the numbers really were. I would suggest Mr. Geeter could well have spent his time telling this Commission what the capital structure of these companies are, what their actual return on equity will be under these protested rates.

The Commission's considerations, quote,"considerations of consistency and fairness", require that we adhere to our previously recognized criteria in investigating the rates of particular pipelines at the present time. 8 percent on valuation ends up with a $3.87 rate.

Admittedly, we took an analysis that looked at the capital structure and we came up with a weighed average of about $3.98. That's what they would be if they weighed it out, That's in contrast to $6.20 of the pipelines.

We are talking about some irreparable injury. And I would like to go back to one further quote. Mr. Walberg wrote a book some years ago, published by the University of Oklahoma Press. I had occasion to look at a page out of it, page 53, University Oklahoma Press, George F. Walberg, quote, "The monopolistic potential created by an extreme spread between pipeline costs and tariff rates were brought to the attention of the Interstate Commerce Commission during the hearings in the reduced pipeline case, quote," -- here he

is quoting and I quote his quotation, "'the margin between the cost of pipeline transportation and the public rate must be narrowed or else those refiners who do not own pipeline will be forced out of existence'", close quotes.

I thank,for that quote, Mr. Lansdale's client because this was the joint brief filed by Standard Oil Company of Ohio and the National Refining Company in the reduced pipeline rates and gathering charge case. In that case, the Commission made it clear that they would not look at the parent companies. They would regulate the individual.

I guess I have used my time. Thank you.

Commissioner O'Neal: Thank you. At this point, we will take a luncheon recess until 1:30.

(Whereupon, a luncheon recess was taken.)

AFTERNOON SESSION

(1:30 p.m.)

Commissioner O'Neal: All right. According to the list that I have, Mr. Kaplan of the Department of Justice, is next.

Mr. Kaplan: Mr. Chairman and Members of the Commission, my name is Donald A. Kaplan. I am an attorney with the Antitrust Division of the United States Department of Justice.

The Department of Justics --

Commissioner O'Neal: Are you reserving any time for --

Mr. Kaplan: I am sorry, sir. Yes,I would like to reserve five minutes.

Commissioner O'Neal: Five minutes for rebuttal. Go ahead.

Mr. Kaplan: Now, the Department of Justice comes before you without any personal economic interest in this proceeding. Our only interest is that the national energy resources be developed in a most efficient, a most economical and most competitve manner.

In a sense, I come here representing our national energy policy. It is for this reason that, when we spotted what we thought was a restraint on that economic, efficient and competitive development, we felt that we had to move against the tariffs -- the proposed tariffs filed by the TAP's owners.

Let me address myself, first, to a point where I think the Antitrust Division should be particularly competent to

discuss, that is, what will the effect be on the competitive development of North Slope oil? There are a number of different figures as to what oil is available. We know, and we are fairly certain, that there are about 10 billion barrels recoverable in the Prudhoe Bay Field, but there may be up to as much as 35 billion more barrels available for shipment to the Trans-Alaska Pipeline System.

Well, if the potential developers have to share as much as $2 of the wellhead price with the pipeline owners, you can imagine who would be the principal developers of that oil; the Trans-Alaska Pipeline System owners. And if each owner has to pay $2 of the wellhead price beyond his share of the pipeline, you know in what proportion they would develop North Slope oil in a lock-step fashion of their TAPs percentages.

We have heard some claims today that the Prudhoe Bay Field -- interests of the owners of the Prudhoe Bay Field and those of TAPs are somewhat different. I think that that refers principally to about 5, and maybe 3 total percentage points.

The greatest obvious difference between BP and Sohio, I think this Commission can completely disregard. If Prudhoe Bay Field is successful and TAPs is successful, BP will own Sohio in a few years.

The Trans-Alaska Pipeline System is a natural monopoly. It is an absolute monopoly. It is, in fact, perhaps a legal

monopoly since it is somewhat unlikely that a second pipeline would get a permit to be built through that zone of Alaska.

The law is -- the Antitrust Law is quite clear about how you treat such natural monopolies. They must treat the public and competitors fairly. They must not charge monopoly profits and take advantage of their natural monopolies.

I am sure the Commission is aware of the famous terminal railroad case. Well, if there was ever a bottleneck developed, Trans-Alaska Pipeline is that bottleneck.

I don't know with whom these carriers suspect they would be competing for the shipment of Alaska oil to Valdez Marine Terminal or anyplace else. I think it is quite clear that any oil within a reasonable radius of that pipeline will flow through the Trans-Alaska Pipeline System when it is developed.

This restraint on development of North Slope oil will potentially delay that development, delay it, of course,as long as the TAPS owners would like it to, perhaps for many years. Even if this Commission promptly proceeds to consider the challenges,the protests by the Protestants here, the proceeding will take very long. There are very complicated issues which should be considered: the cost overrun issue; the proper treatment of taxes; of depreciation of the removal fund; the proper rate base. Shall it be valuation or shall it be net prudent investment or some other standard?

Of course,those issues are not before you now,and we do

not say that they are. In fact, we say they specifically are not before you. But the proceeding is liable to bea lengthy one. Mobile predicts it will take years. Without a suspension those years will be years in which North Slope oil is not developed. And I think there is no question that this country is in dire need of the most efficient, economical and expeditious development of its crude oil reserves.

But the carriers say we will never be able to recover that $2, or whatever the profit figure is, if the rates are suspended. Well, I submit, Members of the Commission, that Congress took that into account when it provided you with suspension power.

Clearly, if Congress knew that carrier would not be able to recover the charges which it had to forego if a rate was suspended, and Congress determined that this Commission, in its wisdom, if it judged the proposed rates unlawful, would exercise its power very carefull, and only suspend clearly unlawful rates.

Commissioner Christian: Isn't this one reason, perhaps, that the suspension power is only limited to perhaps seven months.

Mr. Kaplan: Quite right. That was my next point. I think Congress balanced the equities by limiting the power to seven months. In fact, the exact period of time has been amended, I believe, four times, or there have been four different periods. And, obviously, this was an issue considered; what would be the appropriate length of time.

Initially, it was a very short period and the Commission said it could not possibly deal with some of these complex issues in that short a time so the period was lengthened. Seven months -- I do not know the merits of the seven-month period but, obviously, in deciding that period, Congress

determined that -- that way, Congress determined it would protect the carriers.

We also hear from the carriers that if you suspend these rates, they may not file new ones. They may let the line lie empty and not use it. Some of them don't come out and directly say so, although our friend from Sohio did. In fact, he said, "It's a strong possibility that if these rates are suspended, the line will be one long empty cannon".

Well, I submit, Members of the Commission, that what he is saying is it would be long empty cannon pointed at this Commission. You should not be so intimidated. These carriers are not going to fail to operate this line. They will come back with lawful tariff, if you suspend.

I hardly imagine that the very powerful interests which hold their debt are going to permit these companies to forego the revenue or going to give them a vacation on their requirement to pay back that debt when tariffs are available which pay off all the expenses, including the debt, and return a generous amount on the equity; nor will the companies or the parent company stockholders permit the line to lie empty.

I can imagine the corporate derivative suits which might occur if they make that decision. But there is another factor too. If we find on Friday, or next Monday, or whenever, that these carriers -- that none of the carriers have decided to file new rates, that they all have, in fact, decided not to

operate TAPS, pending the determination of this proceeding, I submit that such a situation would raise serious questions under the Sherman Act.

There is another potential problem --

Commissioner Brown: Would you expound on that just a little bit for me?

Mr. Kaplan: Well, in such failure or unanimous failure by tariff or filed tariffs or not even unanimous, but any failure, with the result of an agreement on the part of these owners not to use the line, in order to coerce the Commission into granting them higher rates or perhaps coerce Congress into-- force Congress into perhaps taking jurisdiction away from the Commission, that would be an issue which could raise anti-trust consequences.

Now, of course, this is not an easy question, and one that could not be examined in this oral argument. There are a number of doctrines about dealing with public bodies.

But I submit that there would be questions raised which perhaps should be examined.

Commissioner Stafford: Do you think the anti-trust people would take action against them if they did that?

Mr. Kaplan: That I cannot predict. The anti-trust division would not take any action unless the anti-trust division was convinced that, in fact, an illegal conspiracy, which was not the subject of any defenses, had been committed.

Commissioner Stafford: Do you think anybody -- one of the representatives, to your left, indicated that based on a re-fund provision that no one would be hurt. Is this your

judgment or what do you think?

Mr. Kaplan: Well, we strongly disagree, or we strongly take issue. He might be successful at convincing the Commission that the State of Alaska, perhaps the native fund,would not be hurt.

However, the United States, the people of the United States, would be hurt, because for as long as those high, inefficient, excessive tariffs are in effect, development of other oil resources on the north slope would be delayed.

And that is the public interest. And there is no way of refunding time. I wish there was but there is not.

Commissioner Hardin: Do you take the position then that the Commission does have the power to suspend?

Mr. Kaplan: Quite clearly.

Commissioner Hardin: Do you take the position also -- what is your position with regard to the Commission's power to prescribe the level of the rate.

Mr. Kaplan: The Commission, of course, does not have power to prescribe rates. But the Commission need not prescribe rates and suspend this tariff.

The carriers have an obligation to file lawful rates. Your suspension order simply gives them leave to file lawful rates and I submit there are some very good standards out there of what lawful rates should be. You have the reduced rate pipeline case of 8 percent to total capital. This was

recently affirmed in Williams Brothers.

Also in Williams Brothers there is perhaps an argument that 14 percent return on equity plus whatever is necessary to pay off the debt would be permissible.

Of course this standard would give the carriers more revenue than 8 percent on total valuation, assuming valuation is about $9.7 million.

The Department would be willing,or the Department probably would be reluctant to challenge rates based on an argument such as that in Williams Brothers or 14 percent return to equity and a return to debt sufficient to pay off the debt, because that is somewhat of an arguable standard. It's not necessarily the standard the Commission would determine after a full investigation but it is, at least, the arguable limits of lawfulness. And, of course, similar returns to equity would, I would submit, in return to pay the debt, have been ruled proper by your brother agencies. For example, recently, the Federal Power Commission, December 1976,said a 13.5 percent return to equity was appropriate. That's the Natural Gas Pipeline Case.

Also in 1976, the Federal Communications Commission said a 12 percent return to equity for American Telephone and Telegraph would be proper.

14 percent return to equity is within the zone, not a 14 percent return to total capital. That's at least one and one-half times what would be a proper rate. But a 14 percent

return to equity would be sufficient.

If I may comment on the Moss Case cited by the Respondents here, well, the Moss Case ruled that the CAB could not prescribe rates. CAB had made no prior rulings as to what the proper rate of return for air carriers was.

This Commission has. In fact, later, the CAB, after the Moss Case, instituted the domestic passenger fare investigation, in which it determined that 12 percent return--a 12 percent return was lawful for air carriers, and subsequently, and uniformly suspended any rates filed which exceeded 12 percent.

Recently, on June 23rd, 1977, faced with a return of 12.4 percent, the CAB suspended that rate.

This Commission has made statements with respect to what would be maximum lawful rates for pipelines. It simply can suspend and rely upon these carriers to take advantage of the maximum lawful rate. They seem to be having no problem taking advantage of perhaps a maximum unlawful rate.

Commissioner Murphy: Mr. Kaplan, wouldn't it be possible for the Commission, however, to go a step further? If they decided that the rate should be suspended, with a proviso that, based on what we have before us and all, that we are suspending that with the opportunity of filing a rate not to exceed the given amount based on what facts we have here -- could be published.

Pending the investigation, the other rates have not been ordered cancelled, but they would still be under investigation.

Mr. Kaplan: I believe that such an order would also be lawful. I believe that would constitute a ruling by this Commission as to what the maximum lawful rate could possibly be, given the undisputed facts and accepting carriers cost.

Commissioner Murphy: It would be the maximum rate at that time pending the outcome of the investigation.

Mr. Kaplan: Well, of course --

Commissioner Murphy: Because you have so many differences of the eight carriers here. I don't think any of them come out just right.

So, wouldn't it be worthwhile, or to the advantage of the public too, to say if we are suspending these pending the investigation, they will accept the rates not to exceed the given amount for entering.

Mr. Kaplan: I believe such an order would be lawful, as I said, if it is based upon the figures for operating expenses,

for debt expenses which are not in dispute. The Department, in stating what it believes a maximum return -- and we are not suggesting these rates; we are saying what a maximum return would be -- use the carriers' figures.

We do not dispute a single one, even though we may do so in the proceeding. We do not dispute anything about whether or not all costs are prudently incurred. And we suggested what maximum rates would be on that basis.

If the Commission were to do the same thing, I believe such an order would be lawful, and would be upheld in the appellate court.

Commissioner O'Neal: Your answer depends on a different reading, I take it, of what the proper debt equity ratio is, as far as different --

Mr. Kaplan: That's a very interesting --

Commissioner O'Neal: Okay.

Mr. Kaplan: That's a very interesting question. The carriers have come here and warned the Commission that they have no power to make factual investigations; they have no power to go beyond the record; this is not an evidential proceeding; all we have is unsupported statements by the Protestants.

Well, similarly, I would caution the Commission that on suspension proceedings, it should not go beyond the stated debt equity ratios of the carriers. They have made a

determination, what the specific carrier -- whether it be Exxon Pipeline Company or Mobil Pipeline Company -- what that debt equity ratio shall be. That is what should be before the Commission.

If at some other time, in a future proceeding or in this proceeding, the Commission says, "Well, we'll take a look at the total capital structure of the parent" -- well, that might be appropriate for a full investigation.

But there is no information before this Commission right now, what the capital structure is, or the true capital structure is of ARCO or Exxon or any of the other carriers. We have a couple representations. But there is no question as to what their interest costs are. And there should be no question as to what their costs of the pipeline are.

But with those accepted figures -- and the Department accepts them for this proceeding -- the Commission can rule that rates in excess of those of the maximum rates determined by the Department are unlawful.

Also, I believe the method of calculating the rates has been determined by the Commission as well. We had citations to a statement by former Attorney General Levy, a letter to Congressman Hungate, statements by the FTC about what this Commission does.

Yet, the latest statement is the statement of this Commission itself in Williams Brothers. And it's quite clear, by the

calculations in Williams Brothers, that this Commission did not double dip on debt, did not let these carriers make a return on the money that was theirs and the money that was not theirs.

This point was conceded. They call Williams Brothers an anomaly. I think Williams Brothers is a proper rule. I think it's the proper recognition of the Commission as to what a maximum return should be.

In that case, Williams was allowed -- or the rates which Williams charged were determined to yield a return for valuation of approximately 8.5 percent, which was within the 10 percent for petroleum products pipelines allowed by this Commission in its early precedence, which it specifically reaffirmed, of course, leaving the more difficult issue of what the rate rate should be and what the rate of return should be to Ex Parte 308.

I think that for the purposes of this suspension proceeding, the Commission should similarly rely upon the law, its law, Williams Brothers, in calculating what the rate should be, allowing the return to the carriers their debt cost, as was allowed by the Administrative Law Judge Commission in Williams Brothers, and allowing the 14 percent rate of return which Williams had represented to the Commission was what it needed and what it used to determine its rates.

Under those bases, we have determined that the rates filed by these carriers may be as much as $2 in excess of what would be fair. And there is no possibility, there is no possibility that a legitimate cost incurred by these carriers will not be paid. There is no possibility that there will not be a return to capital. I mean, if there are costs in excess of what they represent them to be in the various papers filed with the Commission over the last two months, well, then, they should come forward and, if those costs are legitimate, we might agree to a revaluation of the suspension order and, perhaps, permit filing of higher rates, but only -- only -- within previously determined Commission rulings.

Now, on this issue of getting a return to money which is not theirs but someone else's, the debtholders, Congress spoke on this issue way back in the -- when it adopted the Valuation Act in 1912. If I may quote from a report, House report on that: "The anomoly has grown up, gradually

and unconsciously, as it were, grown up in the courts, themselves, as well as the Commission's, that public carriers are to be allowed to charge an income" -- they meant "return" there -- "on what they owe as well as what they own." Nobody else in the world, with whom we are acquainted, was allowed that privilege.

While we are now in 1977, the carriers want to go back to what the situation was before 1912. The Department believes that standard and good regulatory practice does not permit the double counting of interest. The Department is sure that the Commission would not allow it, as the Commission stated in Williams Brothers.

If I may conclude and perhaps move the proceeding along by not taking all of my time, the Commission is enjoined under the National Transportation Policy to promote efficient, economical transportation services; to promote fairness among shippers and among carriers.

I believe adopting that standard, adopting the Commission's decisions in Williams Brothers and the early pipeline rate determination cases leads to only one conclusion; these tariffs are lawful; that there is harm to the public, let along the individual Protestants, and that the rates must be suspended.

Thank you.

Commissioner O'Neal: Mr. Becker, how many minutes do you wish to reserve for rebuttal?

Mr. Becker: We wish to reserve five minutes for rebuttal.

Mr. Chairman and Members of the Commission, my name is William Becker and I appear on behalf of the Arctic Slope Regional Corporation and with me is Mr. Lewis, who will share our opening time with me. Mr. Lewis will consider particularly the effect of unlawfully high tariffs on the Arctic Slope, including the effect on the Alaskan natives. And I wish to consider just simply two items.

First, the counsel for the pipeline companies have gone to great lengths to explain that the rate of return which they will receive on their equity is roughly comparable to that which is received by private industry on capital invested in capital intensive projects.

These carriers, while protesting that the Commission should not consider return on equity in establishing a reasonable tariff, maintain that the parent companies' consolidated debt equity ratio must be used to impute the amount of equity which is actually in the pipeline project.

They urge that the return on equity should not be based upon equity in the pipeline company alone because all of the debt of the pipeline subsidiaries are guaranteed by the parent companies.

Essentially they are arguing for a flow-through of the

parents' debt equity ratio to the subsidiary.

In support of this position, they refer to the testimony of Dr. Ileo. They refer to Mr. Gary of Morgan Stanley Company. They refer to Mr. Solomon of Stanford, and other experts.

In using this expert testimony, ARCO argues for about a 15 percent return on equity, Amerada Hess argues for a 14.34 percent return on equity.

We submit the pipeline companies are comparing apples and oranges.

A very simple examination of the data upon which Mr. Gary computed his return on equity indicates that his source is Standard and Poors. Standard and Poor's shows return on equity on the basis of a flow-through method of accounting for taxes for book reporting of taxes as reflected in Standard and Poor's as well as throughout the financial industry reflects actual tax rates in effect, not some imputed 52.9 percent tax rate that the pipeline companies are using here.

In fact, the recent SEC filing of Sohio indicates that in 1976, Sohio paid--actually paid taxes of 10.9 percent of net operating income.

In addition, they deferred some taxes. They didn't actually pay them. They deferred them. They got an interest-free loan from the government. And their effective tax rate, including deferral, was 29 percent, according to the SEC filing.

I would submit that the experts to which the pipeline companies make reference are considering these 29 percent tax rates, effective tax rates, and not considering the 52.9 percent tax rate.

Let me move on to the comparison of the position of the Arctic Slope Regional Corporation with that of the pipeline companies, Mr. Cleary for the State of Alaska, and with the Justice Department and the Bureau of Enforcement and Investigations.

The pipeline companies and the other parties to this proceeding have referred variously to Mr. Oaks' method of valuation as reflected in his testimony in Ex Parte 308. And they have also referred to the Williams Pipeline cases.

Mr. Cleary adopts these prior valuation procedures as particularly reflected in the Williams Pipeline Case to justify a $3.87 rate.

The Arctic Slope Regional Corporation maintains that a lower rate, something in the range of $3.20, is justifiable on its face in this proceeding.

Our differences with the State of Alaska relate to several factors. First, it relates to the estimation of useful life. The overwhelming evidence indicates that the useful life of this pipeline is considerably greater than 25 years. Justice Department coun[illegible]eady adverted to the existence of substantial res[illegible]che north slope adjacent to the Prudhoe field and also adjacent to the pipeline.

And we maintain that it is reasonable, particularly in consideration of the useful lives attributed to other pipelines owned by these same carriers through their parents to attributs a 35-year useful life. The effect of this is approximately 24¢ in a reduction on a depreciation if the 35-year life is used and there would be approximately a 3¢ reduction on the amortization of removal and restoration expenses.

Commissioner O'Neal: What is the basis for the 35-year useful life? What kind of research have you done on that?

Mr. Becker: Mr.O'Neal, the various studies that have been conducted on the useful life of the pipeline are referred to rather extensively in the papers that have been filed with this Commission. I believe that the Wainwright survey was the one that indicated that based on existing known reserves -- I mean on existing known fields that are actively being produced, the useful life is 35 years.

The other studies all indicate a lesser useful life based upon reserves that are currently in production. However, it is our position that it is most reasonable for the Commission to assume that there will be other reserves that will be actively produced and, accordingly, a 35-year life is justifiable.

In addition, the pipeline companies estimate throughput at 1.2 percent -- I mean, 1.2 million barrels per day. We, of the Arctic Slope Regional Corporation, indicate that if

the throughput increases to 2 million barrels per day, the result will be a substantial reduction in the reasonable tariff amounting to $1.40.

We also argue that there should be flow-through of taxes which is not included in Mr. Cleary's calculations. I have already averted to the effect without attaching a dollar figure on,and the dollar figure depends on what the other figures come out at. So, it is difficult to attach a dollar and cent figure to it.

In any event, that leads me to the final point and that is that we feel that the Commission is constrained to also consider the potential reduction in cost and reduction of pipeline tariff that would result in the finding of mismanagement. And our calculations, assuming there's a 15 percent reduction in total capitalized cost, would result in approximately a 50¢ reduction in the per barrel price under the tariff.

This Commission and all other agencies are not required doggedly to adhere to precedent in determining matters that are under their jurisdiction. As the Supreme Court recognized in the Chenery II case, back in 1947, it is clear that administrative agencies have flexibility to determine each case as it comes before it and may act on an ad hoc basis.

We consider that the importance of this pipeline involving as it does almost 15 percent, or projected 15 percent of the

nation's daily consumption of oil in the immediate future requires a particularized ad hoc review of the costs that are being charged in the tariff, and we maintain that as long as the Commission carefully explains its deviation from prior cases, carefully explains its reasons for reducing costs, that a tariff in the range of $3.20, on the average, is justifiable.

Commissioner O'Neal: Let me ask you a question there. Do you perceive any problem -- I think you stated this in the pleadings,do you preceive any problem as far as far as the natives are concerned in recouping if it is later determined the rate is too high and a refund is ordered?

Mr. Becker: Mr. O'Neal, if I may defer to my associate counsel, Mr. Lewis, who is going to address those questions, I would appreciate it. Thank you.

Commissioner Brown: I wanted to ask one question, please. I think you mentioned the $2 million barrels a day.

Mr. Becker: Yes, ma'am.

Commissioner Brown: Is that the projection now, or was that an earlier projection? Isn't that considerably lower, now, or --

Mr. Becker: Well, as I understand it, the original projection for the throughput of the pipeline was less than a million barre's. It was, then increased to a million two barrels for the years beginning in 1979, and I believe

the data that has been filed with the Commission's support study. In later years, it is apparent that the throughput will increase to 1.6 million and possibly 2 million barrels per day.

We maintain, on the basis of the enormous energy needs of this country and of the world, that it would be reasonable for the Commission to consider that the throughput in the immediate future over this pipeline will be much in excess of the 1.2 million barrels per day that has been projected by the pipeline companies.

Commissioner O'Neal: It is my understanding that in order for the pipeline to have that capacity, or a capacity greater than 1.2 million, that there would have to be some additional construction of some other pump stations and so forth. Are you including that in your consideration or what?

Mr. Becker: I think that the cost for the additional pumping capacity is reflected in the data that's been submitted by the pipeline companies for the year 1978. And I think our data has not been refined to the point of including the incremental financing costs and the like, as a result of that added capacity. However, in terms of that cost as a percentage of the overall cost of the pipeline is relatively de minimis and I do not feel it would have a substantial impact on on the dollar and cents amounts that I quoted to you previously.

Commissioner Stafford: Explain to me, now, how is it your client obtained whatever funds you are talking about? Is it aside from what the state gets, or is it what the state gives you?

Mr. Becker: Mr. Stafford, if I may defer to Mr. Lewis who is going to consider the impact of unlawful tariffs on the Alaskan natives, I would appreciate leave to do so.

Commissioner Stafford: And he will refer them to whether there is also a problem about whether you have some concerns that we have a refund provision, whether you would get hurt by it?

Mr. Becker: Yes, sir. Thank you.

Mr. Lewis: Mr. Chairman, Members of the Commission, my name is Gale Lewis. I am appearing, also, on behalf of the Artic Slope Regional Corporation.

Let me tell you just a little bit about Alaska that hasn't been presented. Most of Alaska is totally undeveloped. There is, essentially, no road system; no intrastate communications system; there are 127 native villages that have no high schools; there is, essentially, no public health service in the state for native people who constitute approximately 20 percent of the state's population.

Now, the figures have been -- Sohio, I believe, projected that Alaska was going to receive a huge surplus which they really didn't need and, therefore, there would be no irreparable harm to the State from having a deferral from having three or four years of proceedings and then have this $2 or $3 suplus paid back into that period.

Well, let me tell you about some of the things that are

budgeted by the state for that money and why they had to budget it. The budget for 1977 is approximately $850 million. We're talking about a $3-per-barrel fluctuation here, a disputed range of $3 per barrel on the tariff which means $3 per barrel at the wellhead price.

We're talking about approximately one-third of the state's budget. Now, right now, under court order, the State of Alaska is obligated to some $60 million to provide secondary education for Alaskan natives.

There is another $50- to $100- to $120 million which is obligated -- which the state is obligated to put into rebuilding the fisheries which, by federal law, were a part of the resources of the native people until very recently.

So, we're talking already about close to $200 million which the state is obligated, in some cases by court order, to put into the state in the next -- 1977, 1978 and, possibly, 1979. Obviously, deferring the $300 -- $250- to $300 million for three or four years, this is going to allow that -- those services to the native people -- again, under court order -- to be implemented.

So, there is a terrible crunch in the State of Alaska and it is obvious that the native people, as they always have been, will be the last to get the benefit of whatever dollars are coming. So, the native people, 20 percent of the state, have a vital, critical interest merely as citizens of the

State of Alaska, in having the rates adjusted immediately to a lawful and reasonable rate, and a deferral of three or four years of these programs is going to constitute irreparable harm to the natives in the state on those grounds, alone.

Now, let's talk about the Settlement Act just a moment and the compensation that Congress intended for the native people to get in exchange for Prudhoe Bay which the oil industry now has.

The people in Alaska had been -- the native people in Alaska had been existing since Alaska was acquired by this country under aboriginal title which, by federal law, meant that the land was theirs and could be taken only by the federal government. It was good against the rest of the world.

In the Statehood Act, Congress allowed the State of Alaska to select 100 million acres of land but reserved land used or occupied by natives. The state selected Prudhoe Bay; a conflict arose; the Secretary of the Interior then told us to freeze on any further land selections. Congress then settled the native claims by taking from them the lands where they had lived, giving those to the oil industry and giving them additional lands as compensation.

The Arctic Slope got approximately 4 million, 4 to 5 million acres, [illegible] surface right, outside of CAT-IV and outside of the traditional Arctic Slope land, as compensation. That land is absolutely worthless unless there is oil

-- unless oil is on that land.

Now, it's obvious that it's a price of the wellhead oil is driven down by the tariff, that the incentive to anybody to come in and invest in the exploration necessary to discover that oil is lost. For $4 or $5 a barrel, nobody is going to come into the Arctic Slope, pay the Arctic Slope people the money that -- lease payments to them for the right to go on and explore and develop the oil.

Oil will not be developed there and their land, until sometime well in the future, will give them no return at all. So, in exchange for Prudhoe Bay, they were given land which is valuable only if the wellhead has value. Tariffs drive that down immediately.

The jobs, the standard of living and all those kinds of things that are dependent upon additional exploration by non-TAPS related companies is very apparent. And that is the second irreparable harm, it's the anticompetitive effect.

The high tariff will pose the entry barrier which will prohibit anyone not connected with the present TAPS owners from making the investment in the Arctic Slope that's necessary to realize for the native people their land.

Now, I've talked only about 4 or 5 million acres of subsurface land on the Arctic Slope. All of the Alaskan natives share, through another provision of the Settlement Act, in up to 70 percent of the revenue that would be derived by the

Arctic Slope Regional Corporation from their land.

So, all of the native people and, particularly, the Arctic Slope people, have, in effect -- their economic future is tied up in their hopes and in the expectation that given an adequate wellhead price today, non-tax related companies will come onto the Arctic Slope and search for and develop the reserves that are thought to be there.

Now, there was a question about the third interest is payments in the Alaskan Native Fund. Now, a deferral of the reduction in the wellhead price--$3 reduction in the wellhead price as a result of unlawful tariffs defers for some 13 years, for an additional six years, that the payout period under the Alaska Native Fund, that's going to constitute an absolute loss of some $60 million, and it's not the kind of thing that can be compensated for by a payment four or five years from now.

The time for the action in Alaska is now. The native corporations are struggling to establish themselves right now to develop their resources, provide basic education and that type of thing for their people today, and a three- or four-year deferral simply -- with inflation and the other things, the cost of living and development in Alaska such as they are -- [illegible] deferral with a refund provision at the end of t[illegible] is not going to it whole.

Children who go for another three or four years without a high school in their town and who have to spend nine months of the year in another city will not be compensated by a refund provision that gives them a high school four or five years from now.

Has that answered the question that the Commissioners had, up to that point?

Commissioner Stafford: Thank you.

Commissioner O'Neal: You are saying, if there is a refund provision and if the money finds its way back to the natives, it's still not enough?

Mr. Lewis: Well, it's not enough because --

Commissioner O'Neal: Because of the deferral in time?

Mr. Lewis: The deferral right now, both in the native fund for the development of their own land, their own resources, their own ability to have jobs now, to work on the crews that do the development, to participate in the development of their own land, would be deferred until the wellhead value is sufficient to induce exploration.

And none of these things --

Commissioner Stafford: About how many people are involved in that?

Mr. Lewis: Approximately 85,000, 90,000 Alaska natives. That's approximately 20 percent of the State's population.

Commissioner O'Neal: Thank you, very much.

Let's see. The next witness is Mr. Greenberg for the Bureau of Investigations and Enforcement.

Mr. Greenberg: Good afternoon, Mr. Chairman and the Commission. My name is Edward Greenberg. I am representing the Bureau of Investigations and Enforcement.

I would like to reserve, with the Commission's indulgence, ten minutes for rebuttal or re-rebuttal time.

Commissioner O'Neal: Ten minutes.

Mr. Greenberg: Before getting into my argument proper, I would like to introduce Mr. Peter Shannon, the Director of the Bureau of Investigations and Enforcement, who will respond to a question that was originally raised by Commissioner Christian.

Mr. Shannon: Mr. Chairman and Members of the Commission, this morning Commissioner Christian asked the attorney for the State of Alaska--I believe two other Commissioners, Commissioners Hardin and Murphy, during the course of oral argument, have alluded to the same type of question -- as I understand your question Commissioner Christian, you asked what if the Commission suspends without prejudice to filing rates, lower rates, and what if the oil companies do not file lower rates -- what then could the Commission do at that time?

Well, I suggest that there are three avenues of approach that the Commission might want to use, might choose to use. Before describing, very briefly, these three approaches, I'd

like to refer the Commission to the fact that four oil companies, Sohio, Exxon, ARCO, and I believe Phillips, are already common carriers, subject to the jurisdiction of this Commission.

I also have been informed that the other Respondents, save BP, have interest in oil pipelines through affiliates. And I know that all the Respondents have voluntarily submitted themselves to the jurisdiction of this Commission by filing the instant tariffs.

With this as a background, I'd like then to refer to Section 14 of the Act. It states as follows,"it shall be the duty of every common carrier, subject to this part, to provide and furnish transportation upon reasonable request therefor.

I submit on behalf of the Bureau of Investigations and Enforcement that because these oil companies are common carriers, subject to the jurisdiction of this Commission, that they are obliged to transport the oil in question.

And should they, hypothetically, refuse to come before the Commission with lower rates, assuming there is suspension without prejudice, then the Bureau of Investigations and Enforcement would proceed immediately in Federal Court to enjoin them from their failure to perform their duty as common carriers, that is, to transport the oil.

This is the first avenue of approach.

The second [illegible]uld be for the Commission to decide but there are possible approaches.

The Commission has been charged under the preamble to the Act of the National Transportation Policy referred to by the attorney from the Department of Justice -- the Commission is charged with the duty to encourage the establishment and maintenance of reasonable charges for transportation services.

And it is my informed opinion that the Commission itself could proceed in the Federal Court and ask for an immediate and permanent injunction against the oil companies for failure to perform their duty as common carriers.

A third approach, which is also for the Commission to decide, is that this Commission, I believe, assuming failure to submit reasonable rates, reasonable tariffs -- this Commission itself could order the common carriers to perform their duty to transport the oil under reasonable rates.

And if there is failure on the part of the oil companies to do so, then, again, I believe the Commission could proceed immediately in the Federal Court.

We would provide our services of this Bureau, hopefully with the Department of Justice, alone if necessary, to enforce the Commission's order.

Now the argument in the case today on behalf of the Bureau of Investigations and Enforcement will be presented by Mr. Greenberg. [illegible]ere are any questions on these three possible approaches that I suggest, I'd be happy to entertain them before turning over the podium.

Commissioner O'Neal: How would a rate be determined in those cases?

Mr. Shannon: How could a rate be determined?

Commissioner O'Neal: Yes, what rate would you --

Mr. Shannon: Well, we submitted -- and of course, the other Protestants have -- we submitted -- and we believe we have the documentation therefore -- we submitted what would be a reasonable rate, so the Commission could suspend the rate without prejudice to submitting a rate not to exceed the reasonable rate predetermined.

Commissioner O'Neal: But you would be seeking performance under the rate as the Commission determines, first of all --

Mr. Shannon: We would be seeking -- if we went in as a bureau, into federal court, we would go in for a permanent injunction, asking the court to order the oil companies to perform their duty as common carriers, and that is to transport the oil.

Once they are common carriers -- since this Commission knows, in the reorganization, you have entrusted to this bureau the enforcement of adequacy of service. And whether it's motor carriers who've failed to service the towns that they're committed to service, or whether it's the railroads, we are to go in and enjoin them, to make sure that they do adequately perform their duty of service.

We submit that the same applies no less to the pipeli-

the oil companies.

Commissioner Hardin: The level you are talking about, then, actually would be tantamount to being a reasonable maximum. Is that what you're talking about?

Mr. Shannon: That's right. That's what you referred to earlier, Commissioner.

Commissioner Christian: I assume that, since this would only occur -- this entire scenario under your three options would occur only after the Commission had previously issued an order suspending without prejudice to a particular level -- that it's that level --

Mr. Shannon: That's right, Commissioner.

Commissioner Christian: -- that all of these options would be directed to.

Mr. Shannon: That's right. That was a hypothetical -- I didn't explain myself clearly -- that was a hypothetical I thought you opposed earlier.

Commissioner Christian: Right.

Mr. Shannon: Thank you.

Mr. Greenberg?

Mr. Greenberg: Thank you.

I guess the first question to be addressed is why is the Bureau in the case? Simply stated, it's because the rates are too high.

We have estimated that in 1978 the overcharges which will

accrue to these carriers will exceed $600 million. We don't quarrel with their expenses. We don't quarrel with any figure at all that they have offered in support of these tariffs, with the exception of one item.

Several of the carriers have dreamed up a figure of $4 billion as the removal and restoration costs, whereas the remainder stick with a study which has not heretofore been published, and has not been presented to this Commission, in the neighborhood of $1.049 billion.

There has been no explanation insofar as where the difference between that particular item, so we have stuck with the $1.049 billion. For the purpose of this argument, we are even going to withdraw from our protest position of the service life of 27.5 years. We believe that the situation and the entire presentation can be better presented to this Commission by addressing the standards on the ground rules that these carriers have established.

The difference in our argument is how have they computed their rate of return? And I suggest that the best way of approaching this entire problem is by reciting one portion from Mr. Flynn's brief on behalf of Exxon.

"The Commission's role in this suspension proceeding is relatively simple. In exercising its discretion to suspend or not suspend, all that this Commission could do is to examine the rate filed by Exxon to determine whether or not that rate

has been established in accordance with the practices conventionally accepted by this Commission.

"If it has been, the Commission should refuse to suspend the rate, leaving the Protestant and other affected parties to pursue the remedies under the Act."

Mr. Flynn, of course, doesn't add that if they had not filed their tariff in conformance with those procedures, the Commission should, in fact, suspend.

We will show that these procedures have, in fact, not been followed. The result of this exercise, which is a departure from all known precedence, all established ratemaking standards and logic, is that these carriers will reap the windfall of the 40 percent return on equity in 1978. Using Commission established procedures, they are receiving a 13 percent return on valuation, as the Commission has historically accepted that concept of return on valuation.

Further, as throughput increases as indeed it will, and as economies of scale occur, the windfalls will increase. For example, in the handout which I have given to the Commissioners and all Counsels, on Exhibit 6 we have charted Sohio's future experience in this line.

And it can be seen, on page 1 of that exhibit, that Sohio's return on equity by 1980 will approach 200 percent. We suggest that the public interest cannot abide such a result.

The second reason we are in this case is because this is

a unique case. In addition to the ratemaking question which is here before you today and the level of rates, the Commission has the responsibility to undertake a valuation under Section 19A. This valuation process has been going on for some time, in the form of investigation being conducted by the Bureau of Accounts and their consultant, Touche Ross.

And we will discuss in a few moments the fact that it is our position here that the oil companies and their agent Alyeska have not given the full support to that valuation which is necessary. And it is only with the timely completion of that valuation that this entire proceeding can be closed once and for all. Until that valuation proceeding is concluded, this case will have to remain open.

First let me just say it is certainly our position that the Commission has the power to suspend. There can be no doubt about it. The statute clearly says it has the power. We suggest and argue that the Commission not only has the power but it must suspend because, in addition to the arguments that we've heard today about the stifling impact upon competition, the restriction of production and the inhibition of new exploration, all we've been talking about is the exploration for approving gas reserves.

In Exhibit 1 of the handout we've given you there is also exhibited oil reserves. We also have gas reserves of 99 trillion cubic feet. This is estimated by the U. S. Geological Survey. Unless these reserves are fully exploited, we're not only facing an oil short-fall but also a gas short-fall.

The Bureau is asking for a suspension of the present rates and an investigation of whatever rate ultimately comes out of this particular proceeding. We will suggest that the carriers be granted special permission to refile on short notice, if they, first, use the proper methodology which has been established by the Commission and conform with the classical ratemaking standards;

Number two, if they agree to produce the documents and not interfere with the orderly process of the valuation proceedings; and, number three, if they agree to refund to

shippers any overcharges later found to occur at a rate of interest not to exceed -- not to be less than nine percent.

We have heard today that the carriers have agreed to an eight percent return -- eight percent on any refunds. I don't understand where the eight percent comes from, but I guess because we have chosen nine, they have chosen eight.

As the Hope Natural Gas case makes very, very clear, the theory of return on valuation is an attempt to reimburse carriers who have dedicated their investment to the public use, their return for their entire investment.

That investment is not just their cost of -- it's not just their cost of equity, but is also their debt cost. The difference between the Bureau of Investigations and Enforcement and these carriers is the way these carriers have treated interest.

Now, I would like to turn your attention, please, to Exhibit 2 of the exhibits, and here we set forth the formula, on the first half of the page, on how the Commission has historically treated valuation and rate of return on valuation.

The question is, shall the Commission allow the pipeline companies the opportunity to earn up to ten percent of valuation which is the highest the Commission has ever historically afforded any regulated carrier, according to that established formula, which is you take the interest, the cost of interest, and the after tax return for equity, divide that by the

valuation and you come up with your rate of return for valuation. The highest ever given by this Commission is ten percent; or, the question that the carriers would like to have you answer is, shall the Commission, for the first time in any reported case, allow the carriers to earn as much as seven percent valuation just for equity.

According to a formula, it is never approved for pipeline ratemaking purposes. The only support for this is one unreported case of an Administrative Law Judge which can be readily extinguished.

The impact of how you treat this formula is the extraordinary returns on equity that we've spoken about. Now, one point that's been mentioned by -- and I believe, again, it was in answer to a question by Commissioner Christian is, how do you treat the debt equity ratio with regard to the parents? Which debt equity structure do you talk about?

And I don't recall -- I think it was Mr. Lansdale indicated that in the AT&T cases, it has, in fact, from time to time, the various regulatory agencies have looked at the parents' debt equity structure.

I would like to read a short statement from Principles of Public Utility Rates by Professor Bonbright, from Columbia University. "But if the existing security structure is clearly unsound, or is extravagantly conservative, the rule must be modified in the public interest. Actual cost of

capital may then be disqualified in favor of legitimate cost. Thus, in post-war rate cases, the operating subsidiaries of the American Telephone and Telegraph Company have defended the objective of a one-third debt ratio for the consolidated system, whereas various non-company witnesses, including myself, on occasion, have argued that a somewhat higher debt ratio would be justified." This is at page 244.

The meaning of this is that while it is true that various agencies have, from time to time, looked at the debt equity ratio of the parent, they have done so only to minimize the impact of the rate upon the public, not to exaggerate its impact.

We suggest that only by deducting the interest from the operating expenses, which they have done, can they hope to persuade this Commission they have stayed within the historical guidelines of rate of return on valuation. It is the only way they can do it.

Now, you can see, on Exhibit 5, we have extracted from Exxon's tariff, from their reply brief -- and, by the way, the last two lines of that page, we have inserted, those are not from Exxon -- they have indicated a return on valuation of 7 percent. Well, as we have heard today, this is a concept of comparing apples with oranges. This is not return on valuation, as the Commission understands it. This is return on valuation without accepting or understanding what the cost of attraction of debt capital is. So, we've got 7 percent return on valuation that is not return on valuation.

The actual return on valuation that Exxon is requesting is 12.2 percent. That figure you get by adding to their return on equity after taxes, and you add back in the interest expense and you come out with 12.2 return on valuation. That translates into a 49.6 return on equity.

I suggest that the Commission is not going to tolerate this kind of latitude from established procedure. In fact, I guess the carr[illegible]e made an eleventh-hour admission at this time, and have admitted for the first time that's exactly what they are doing.

We have heard them talk about the testimony and the verified statements in their replies from Dr. Gary, Mr. Solomon, Mr. Jeter. Well, these gentlemen understand what we're talking about. They understand that the return on valuation they are seeking is 13 percent. That's what the issue is. They say, "It is 13 percent. It isn't good enough." We suggest this is not the forum that that rate of return standard can be altered. The correct form is either later on in the investigation of this rate or in Ex Parte 308.

Exxon and Sohio, respectfully, make that concession in their briefs, at page 45 for Exxon and page 19 for Sohio. They admit what their rate of return on valuation really is.

So we are through masking where the culprit is. The culprit is, what are we talking about, return of valuation? Where do you treat the interest? The Commission has historically treated interest as a part of the return on valuation. To do so, distorts the entire concept of rate of return on rate base. It just doesn't make any sense.

Now,they have tried to confuse the Commission,and have done a pretty good job of confusing me by trying to talk about this 1941 consent decree. Well, that is actually the second half of that ratio that is on Exhibit 2. That's all that is. But the 1941 consent decree has no relevance to the Commission's practice on ratemaking. That relates solely to restriction on dividend payoff to the owner companies.

We suggest there is no reason to worry about what kind of dividends they are going to pay up to their parent, because they are doing very nicely.

Now, if I can just take a few more minutes before turning it over, I would like to just briefly discuss the question of the record access problem.

There has been no outright refusal of access to the Commission's Bureau of Accounts or to Touche Ross. However, there has been an unusual procedure by which Alyeska and their counsel have been orchestrating the flow of documents and witnesses in a manner which is not consistent with the independent exercise of the Commission's responsibility in this proceeding. They have decided which documents are going to be turned over and when they will be turned over; which people will be interviewed and when they will interviewed.

We suggest and, in fact, argue that Section 19(a), Subsection (e) requires free access to every common carrier for all documents and all personnel. This has not been the case. We suggest that only through an affirmative order of this Commission can we arrive at a cooperative understanding, on the part of the owner companies, as to what their responsibilities are for furnishing this Commission with information necessary to go forward with the valuation.

Thank you.

Commissioner O'Neal: You have more time left. That was an error by the timekeeper. So, if you want to take it, go ahead.

Mr. Greenberg: I would like to back up for a moment then to the Commission's power to suspend which we've not addressed, except on our protest papers.

Now, certain of these carriers have indicated that the cases we've cited are not relevant to this particular proceeding because we're only citing cases where the Commission has decided its power and exercised its power under Section 216, saying for some reason there is a distinction between Part 2 carriers and Part 1 carriers.

Well, for their edification, we'd like to cite a few more cases where the Commission has commented upon or exercised its power to suspend initial rates.

The citations I'd like to give the Commission are Galveston Wharf, 23 ICC 535; Cotton From New Orleans, 49 ICC 751; Rail, Water Grain in Bulk, 321 ICC 564; and Lake Cargo Call, 329 ICC 549.

There is absolutely no authority for the proposition that there is distinction between a concept of new and initial rates.

But even if there was, as to Exxon, Sohio, and ARCO, these would not be new rates.

They've made the argument that what they're really talking about -- in the cases we've cited -- are really talking about is the Commission has exercised its power to suspend new service but has never restricted access to the entry of the

field of regulated transportation.

Well, as to ARCO, Exxon, and Sohio, since they are clearly already regulated carriers, actively participating in currently operating oil pipelines, their access to the field is still quite clear and extensive.

We have not rejected that by suspending these tariffs.

I'd like to talk about the question of irreparable injury.

Now, we've discussed -- it's been discussed and batted around a great deal. The question really is, I guess, is the Commission going to permit itself to be, in the words of counsel over here, blackmailed?

They've tried to turn it around. But that is exactly the situation here. These carriers are attempting to persuade this Commission that there is no rational limit upon how much they can earn. We suggest that public interest cannot accept that concept.

49 percent return on equity is incredible. 200 percent return in 1980 is unbelievable. It's got to be stopped and the Commission has the wherewithal to do it now.

Thank you.

Commissioner O'Neal: What's your response to the argument that if the Commission sets the rates too low that there is no way the pipeline owners can recoup losses?

Mr. Greenberg: Well, number one, we don't think that the

Commission would ever be in the position of setting the rates too low and this is perhaps an argument that I neglected to make.

We are not suggesting, although we included, as Exhibit 9, an itemization of what the rates would be if these carriers were to accept classical rate-making practice accepted by the Commission.

What we are saying is, there should not be a prescription by this Commission. There is no reason for the Commission to prescribe a rate.

All we are asking for is the carriers to refile their rates, consistent with established precedent.

Now, there is the question of recouping losses. Well, by and large, the carriers are only recouping losses that they're going to get from themselves. They are moving money from one pocket to the other.

Now, we've heard BP talk about, they -- I'm not sure which carrier it was -- talk about that they had no particular interest. Nonetheless, they'll be able to move oil. The ballgame is in their park.

Commissioner O'Neal: What about the carrier that owns no North Slope production facilities or areas?

Mr. Greenberg: Well, they're going to be able to take these revenues and explore and I have no doubt that they will, in fact, continue to explore for further oil.

The problem is that it is a balancing of equities. As to that carrier, there is a balancing of equities. We suggest that the public interest is not the one that should suffer.

Commissioner O'Neal: Is there -- going to another area, just to follow up on that -- is there -- or what is your argument for the Bureau not being subjected to the usual discovery rules in this case, as any other party would be?

Mr. Greenberg: Well, the valuation process is not an adjudicative procedure. It is an ongoing proceeding. It is a preliminary step in the Commission's ultimate decision in this particular case. It can only be done in an objective and clear way if there is the kind of clear access to records that is mandated by Section 19(a)(e).

If you throw that out, you throw out the value of a valuation proceeding.

This is not, even this entire proceeding, is not adjudicative. It is clear that this is an informal rule-making proceeding. There is no reason for the Bureau to have to rely upon the rules of practice and proceed and make sure that we have an objective valuation.

Commissioner O'Neal: Well, is your argument that you have a role beyond that of the ordinary witness or the ordinary party?

Mr. Greenberg: In essense, yes, it is. We have adhered to a very close line. We have no axe to grind here although

it may sound somewhat to the contrary.

All we're trying to do is develop a record that is consistent with established Commission precedent. We don't care what the rate is as long it is consistent with Commission practice.

I might just add, I guess it is perhaps a departure from where your question was, if there is no further follow-up to that, Mr. Chairman.

Commissioner O'Neal: Go ahead.

Mr. Greenberg: That is that insofar as the computation of this rate, there is no difference between the method that we are setting forth as the appropriate method and that which Mr. Cleary has addressed today.

I think perhaps Mr. Cleary neglected to add that it is the treatment of interest which is the crux of the situation. How do you treat it? Where does it go?

Mr. Cleary's difference is that he says, he wants an 8 percent return on valuation.

All we are saying here is, they should not be permitted to obtain any higher rate of return than 10 percent, which is the highest this Commission has ever awarded.

Thank you.

Commissioner O'Neal: I guess this would be a good time to recess. [illegible] at 3:00 o'clock.

(Whereupon, a short recess was taken.)

Commissioner O'Neal: It is now time for the pipelines on rebuttal.

Mr. Flynn: Mr. Jordan will speak for the pipelines.

Mr. Jordan: Mr. Chairman, Commissioners, I've always heard stories about what it was like to fight a war on two fronts in Europe and I think I now know how it feels and, perhaps, a little bit more so.

We're not going to try this afternoon to respond to all the points that have been made. Obviously, we can't and, obviously, it wouldn't be productive to do so. I would refer the Commission to the substantial papers that have been filed on behalf of the carriers where a number of these points were dealt with in considerable detail.

At the outset, I would like to put my ARCO Pipeline Company hat on for just a moment to clarify one point. Mr. Lansdale made a reference to the inclusion of the refund provision in the tariff. I think he indicated that everyone had agreed to that, or at least that is what I thought he said. That may have reflected a slight misunderstanding.

ARCO Pipeline Company is considering that as a course of action, dependent largely on what the Commission does. We have not rejected it as a concept, we do have it under active consideration [illegible] not received the approval of management to say that we are at liberty to include such a refund provision. I just wanted to make that clear so there wouldn't be

any misunderstanding about the positions of the various companies.

As you know, some companies have said here today that they interpret the reparations provision, essentially, as flowing through and others have not said that. There are, obviously, matters of interpretation here on which the answers are not entirely clear.

I would also like to, just in passing, say that I think the Commission ought to give serious consideration to the propriety of the Department of Justice 11th hour submission. I note that their original submission, which we got in the form of a protest, amounted to about 11 pages. All of us arrived here this morning to find a 47- or 48-page reply brief. That sort of inverts the normal relationship between your main paper and your reply brief and I think it is inherently unfair. And since the Commission rules do not provide for that -- I realize it's within the discretion of the Commission -- I think that's a factor that ought to be taken into account and I don't really think it's important in terms of the substance of what has to be determined by the Commission on a very short schedule.

Let me just say one thing about the initial tariff point and the power to suspend; there are cases in which the Commission has suspended what we will refer to as initial tariffs. The new cases that were cited by Mr. Greenberg, I think, were

all cases that had been cited in one or several of the carriers' briefs.

The point on that is simply this; we have been unable to discover a single case in which a suspension of an initial tariff came about in such a fashion as to effectively deny the service in question. In other words, there are other ways the traffic could move; there are other circumstances which allowed traffic to proceed.

We have not been able to find a single case in the Commission involving the suspension of an initial tariff which is comparable to the case that's here today. And as someone pointed out this morning or asked in a question, there just aren't any cases on this. No court has decided this. And the arguments which we make are based on the analysis of the statute and on a rather extensive interpretation of the legislative history which is contained in the Mobil brief.

I would like to say just one thing about the Moss case.

Commissioner Hardin: Are you saying you would refuse to move the oil if some rate below that which you have filed is --

Mr. Jordan: We're not saying that, Mr. Hardin. We're not saying that at all. Each company is ultimately going to have to look at its own economics, which vary, to determine what it would do based on what the Commission would do. There is obviously a difference between those companies that

are in the pipeline business and don't have any oil and those who are in the pipeline business whose affiliated companies do have oil.

I can't say what the response would be. We're certainly not saying that -- to this Commission, the oil will not move. That's not what's being said here today.

Now, with respect to the Moss Case, it seems to us there's been a lot of sort of very skillful footwork around that case. I don't think any of it has been successful in sidestepping what was said in the Moss Case. The Moss Case, essentially, said that you cannot use the suspension provision as a club to prescribe tariffs.

Now, as I read all of the suggestions which the Commission has gotten from Protestants, they are, essentially, not that there be a bare suspension but that there be a suspension with a suggestion. And it is our argument that the suspension, coupled with a suggestion is precisely the kind of action which the D. C. Circuit found was improper in similar circumstances in the Moss Case.

Commissioner Murphy: Wasn't there some distinction in that didn't the -- in the Moss Case, the rates were ordered cancelled, I believe in that case. And they prescribed the rates to take effect in lieu of those rates, wasn't it?

Mr. Jordan: Well, I don't think there is any distinction that is significant. There are differences between the Moss Case, in terms of the history, the prior history of the Moss Case.

Commissioner Murphy: We are speaking here, though, of ordering the rates cancelled and these established in lieu of them. They are being suspended and being put under investigation, whereas in the Moss Case, as I recall it, those rates

were ordered cancelled, period, and these are going to be new rates, in what they prescribe, and the court said there, you ha no basis to prescribe rates for the future. But we are not talking about that part of it here, or I am not.

Mr. Jordan: The proper element is the suggestion, a suspension coupled with a suggestion that rates at a different level would be acceptable. But the Interstate Commerce Act does not give the Commission the power to prescribe rates without a full hearing. I think that is our point.

Commissioner Murphy: Let me be straight on mine. I am not saying we would prescribe the rate but on the record of the information that you have given us, the information that we gotten from the other parties, we are coming to as near a satisfactory conclusion of what the rate would be, tentatively assessed, until we can complete the investigation.

Now, if you are going to put the information here that we can go on, unreliable, or something of that nature, it is part of your blame as well as, maybe, some of ours.

Mr. Jordan: I would like to be very clear on this point. It is our position that this is not an evidentiary proceeding. It is our position that this is not an appropriate proceeding in which to receive evidence and try to make judgments which involve deviations from prior Commission practice. This is a suspension proceeding, and one can argue about whether the Commission has the power to suspend at all,or not, under these

circumstances, but let's assume for the moment that the Commission does have that power to suspend. What we are really saying is, "Okay. You can suspend if you have that power", but what you cannot do is you cannot suspend and say, "leave the file on one day's notice of tariff at these suggested levels." That is tantamount to prescribing a rate. It is particularly tantamount to prescribing a rate with the economic cohersion factor involved here with $9-plus billion of assets lying fallow. That is, effectively, in economic terms, the prescription of a rate.

Commissioner Christian: Are you relying on any other case other than Moss against CAB? The reason I ask that is my recollection is, a number of cases since that time have distinguished Moss to the point that I really have great difficulty in finding Moss applicable, myself. Are you relying on any other cases?

Mr. Jordan: Well, there was a reference to this in the Scrap Case, as well. Now, I recognize that that was Judge Wright quoting Judge Wright, I believe.

Commissioner Christian: I believe it was also referred to by the Supreme Court in overturning Judge Wright's decision in the Scrap Case, too.

Mr. Jordan: That's right. But I think that there are not a great many cases in this area, and the reason is that it is generally recognized that this is not an appropriate

way to proceed. It is not an actively litigated area. There's not a lot of case law. The Moss Case is really the landmark case in this area and I think it is one that the Commission will certainly have to give consideration to.

Commissioner O'Neal: But, aside from the question of whether this is putting aside the initial rate question, the Commission has done this in the past with other kinds of rates and it has suspended without prejudice to refiling at a lower rate. And you don't know of any case that says the Commission can't do that.

Mr. Jordan: In terms of ICC procedure, I do not know of any case.

Commissioner O'Neal: We are talking about suspension here. We are talking about a different kind of standard. As it has been stated, I think, is there reason to believe that the proposed rates will be found, after a full investigation, to be unjust and unreasonable or unduly discriminatory? And you are saying that even if the Commission finds that to be the case, it can't indicate what would be a reasonable maximum rate?

Mr. Jordan: Well, there's a range of options for the Commission. There is the pure suspension. There will be suggestions in connection with a pure suspension as the reason for the Commission's suspension. If, thereafter, carriers chose to read that opinion and come in with further

filings seeking special leave, there is obviously no prohibition on them doing so, no guarantee that it would be accepted.

What we are really saying is that the positions that are contended for by the Protestants are a blatant, flat out attempt to have the Commission go around its lack of power to prescribe rates without full hearing and do exactly that, i.e., effectively prescribe a rate without the required hearing. I think that is the gist of the argument.

Commissioner Murphy: If the Commission, though, takes the information that you have furnished and this is not one under oath, I grant you it is not a formal hearing, but you, as well as the rest, are supposed to give us the actual facts to the best of your ability and that's what we have to go on.

Now, the Commission has to explain why it takes any action whether to suspend or deny. We have to give you some reason for it. What would be wrong if the Commission found that, based on this rate, as informal as it may be, that the information and data that you have supported doesn't justify the charges that you have published, but it does justify rates that do not -- that may equal, or be less than the level given?

Mr. Jordan: I would say this. I don't believe that there would be adequate support in the record for such a determination by the Commission. We have furnished a certain amount of information. All of that information, in terms of weight in the record, is directly contrary to such a finding by the Commission.

With respect to verified statements, the only thing that borders on that is Dr. Ileo's statement, which was an attachment to the Alaska protest.

Now, there is the Lendsner piece. But it's already been said here today that no one's contending that that's an appropriate basis for any decision today or that any judgments ought to be drawn by the Commission from it.

So I would say, where's the record? Where are the facts that would justify that? We've got assertions. We've got arguments of counsel. But courts have often recognized that there's a great deal of difference between assertions and arguments of counsel and facts.

I don't think the facts are there. That's going to be our position.

I'd like to move on, if I may, to talk about what is really the key point here, I think, of all today, and that is the 8 percent return approach and what is really involved there.

I thought Mr. Cleary did a very good job of hiding the ball with respect to what the true issue was on the 8 percent.

It is our position that it is the established methodology of the ICC, long-indulged in by the pipeline companies of this country, to apply an 8 percent -- or in consent decree cases, in effect, a 7 percent return on valuation -- and, in so doing, to treat interest on debt as an expense, i.e., above the line, as the saying goes, as distinguished from being below the line.

Now, I would have to concede to the Commission that I cannot point to a single Commission decision which says in nice, stark, black-letter terms, that is the rule of this Commission.

But I would also say to the Commission, that nobody on this side of the rostrum has been able to point to a single Commission decision with nice black-letter law saying interest goes below the line.

In the Williams Brothers' Case, no contest there on the interest issue. It's shown below the line. But that wasn't the point in the Williams Brothers' Case and it was not addressed. So that's not a decision on the merits with respect to interest.

The earlier cases, nobody was really addressing that point. It wasn't an issue in those days. That's not what everybody was looking at.

Now, a practice has developed. As we pointed out in the ARCO presentation, Chairman Stafford went down before the Congress and explained to the Congress the relationship between

the consent decree and the 8 percent limitation allowed under the ICC procedure.

Now, his point down there was, that the consent decree is acting as a limitation, basically, on the earnings of pipeline companies, because they are basically not allowing themselves to earn more than they can pass back as dividends under the consent decree.

The simple fact of the matter is that that could not have been true if there were a difference in the treatment of interest as between the ICC methodology and the consent decree methodology for any pipeline that had a highly leveraged capital structure.

And Exxon has set forth in its papers a formula that will let you sit down and figure out just how that works. We have also made reference to--and I haven't heard anybody here lay a glove on it today -- what we've referred to as the home-gate data. That was a submission by Chairman Stafford. It was really two submissions.

Somebody, I think Mr. Cleary, joking, said, well, I had go back and correct it.

Well, I think that's significant. They submitted one in November and then, I think, the ensuing March, they submitted another one.

The point is, that somebody went back over those numbers, checked every one of them, and then resubmitted the data to

the Congress, as an official expression of the Commission on what the rate of return on valuation was.

We had Mr. Jeter of Arthur Anderson pull the Form P from the Commission's own records, do all of the calculations for all of those companies, and with the exception of, I think, three, where he couldn't find the Form P -- for the selection you picked was a lot more than the companies represented here today. In every case, it showed that rate of return on valuation was calculated assuming interest as an expense.

That's not a decision of the Commission and I recognize that distinction. But I think it's the best possible evidence as to what the practice of the Commission has been.

Now, let me say something about this development of --

Commissioner O'Neal: Let me ask you, just to get this on the record. You are talking -- do you agree with the characterization of what you are seeking in terms of return on valuation that -- I think BIE said that you seeking 12.5 percent, in effect, on valuation?

Mr. Jordan: Well, we're seeking 7 percent on valuation, as we have always understood the whole concept of rate of return on valuation.

If you take away interest as an expense --

Commissioner O'Neal: You are seeking 7 percent on the total valuation plus interest?

Mr. Jordan: Well, we're seeking 7 percent return on valuation

and before we calculate what that return is -- what the net income figure is -- we have taken out interest as an expense element. Just along with operating expenses and other forms of expenses, we have taken interest on debt.

We tune that to the 7 percent figure in the consent decree and that is our understanding of the methodology.

And it seems to us that what we're being told here today is that they would like to take away the historically recognized, we think, interest deduction, but hold tight on everything else, basically. Except the Bureau would say, well, we'll up it to 10 percent. Now, that in itself represents a deviation in Commission practice for crude lines. This is a crude line. The old cases established 8 percent for crude, 10 percent for product.

Commissioner O'Neal: I think you are, in effect, seeking or proposing a debt equity ratio so that you get 100 percent equity. That's what you're talking about. And I assume you're saying that because the parent companies have guaranteed the --

Mr. Jordan: We're not seeking anything based on 100 percent equity. What we're saying is that we believe the Commission methodology involves coming up with a valuation under Section 19(a) and there are elaborate procedures for doing that, for having a tentative valuation and having it challenged.

We think we're entitled to this rate of return on that valuation, in accordance with traditional practice.

Now, what the Protestants are saying is, let's take away the interest. It's always been deducted and always been allowed. But on the other hand, let's not let the rate of return go up to any sort of fair level.

Now, talk about double-dipping. That's double-dipping with a vengeance. In other words, you're taking away something that everyone has historically relied on and saying, hold tight there after you've taken that away. Don't change anything else except for the 10 percent concession.

We don't think that's fair. It's not the basis on which this investment was made. It's a contradiction of prior Commission practice and as we point out, we don't think it ought to be done in this proceeding.

If that kind of decision is going to made by the Commission, it can be made by the Commission, so long as it ends up at a fair rate of return overall. But 308, we think, is the place to do that.

As far as the capital structure point is concerned, the point there was -- we're not contending for any change in the method of calculating rate of return. I tried to make that clear this morning.

But we were offended by these very, very high rate of return figures which continue to be thrown around. And we

offered this point about capital structure just to put this whole issue in perspective, to say that, you can't look at it that way.

Mr. Cleary made an offer of the testimony of Dr. Ileo, which he said was available. I,too, would encourage everyone to read that. I think when you read everything that Dr. Ileo says about Makisky and TeSoro and the relationship between them, you will not be able to draw any distinctions, as a practical matter, between that and the relationship between the parent companies here and their subsidiaries. With 100 percent of the debt guaranteed, it really doesn't make much difference whether you lend them the money directly or you have a fusion of capital or what you do. The guarantee of the debt is the equivalent of all of those other techniques. And there simply is no distinction and no explanation has been made that would distinguish the views of our experts or say in any significant way that Dr. Ileo's view is not consistent with those of the people that were cited.

Let me make one [illegible] point with respect to this development of oil situation. A lot has been said about delay in the development of oil. A couple of points.

First of all, we are unaware that there are any prospective sales of additional leases on the books by the State of Alaska. Until that takes place, there won't be any significant further development of oil. There will obviously be further work with

respect to established fields.

This is basically a timing question. It seems to us on this, as on many other points, the real course of action, the fair course of action, I think, to really resolve all of these conflicting interests that have bubbled up here today, would be for the Commission to resolve to proceed as rapidly and as expeditiously as possible to resolve this whole matter.

In other words, have a proper hearing. Determine what the lawful rate is. Everybody will know where they stand. And this problem of delay that affects the Arctic Slope Corporation will be greatly diminished if the Commission would move ahead rapidly with this.

This argument about delay in the development of the oil will similarly fall to one side.

Oil development is a longterm thing. It's not something that is going to take place in seven months, the maximum period of suspension allowed by the Act.

So there is a way. There is a way to handle this properly and that way is to move ahead on valuation and move ahead on investigation. No one has really objected to the concept of investigation. I think we all recognize that there is going to be an investigation unless we are very much surprised.

Move ahead on 308. We still think that 308 has moved along fairly well and has the promise of resolving many of

these knotty, sort of methodological questions. And the best thing to do is to keep 308 moving so that the input from that can become effective with respect, no only to this pipeline, but to all other pipelines.

So we think that's really the only fair way to do it.

Now, there was one point made with respect to the windfall question, the question of the increased throughput. I trust the Commission understands that the tariffs that have been computed -- I think it's clear in the supporting justifications -- have been computed on the basis of averaging over a certain limited period of time, as is traditional, based on certain assumptions about throughput, including increased throughput.

Now, if you will look at the various papers, you'll find that different companies have different assumptions about throughput. Some people think it's going to one level in 1980 and some people think it's going to another level in 1980. The point is, the tariffs were set on the basis of those assumptions.

They are not set for all time. They are not tariffs which were intended to apply, on the whole, when those assumptions which are no longer valid and when there is an expansion beyond the kind of expansion that is set forth in those assumptions.

So, the process of windfall is really misleading. If you want to talk about reverse windfall, the companies could have pegged their initial tariffs to a 600,000-barrel-a-day rate rather than the 1.2-million-barrel-a-day rate. At that point, I can't even think what the tariffs would be but we'd probably be talking about a $9.50 or a $10 tariff.

What has been done here, in order to make the tariffs more reasonable, is to utilize an averaging period and that averaging period typically includes increased throughput even beyond the 1.2 million barrels a day and that includes the need for further capital expansion. So, don't be misled by this sort of windfall argument. That is just not so; it's not the way it would work; it's not the way the tariff structure was set up.

Commissioner O'Neal: How long would you be pumping at a 600,000-barrel rate?

Mr. Jordan: Well, people have different views about that. In the ARCO submission, we projected that we would be pumping at that rate for September and October. Other submissions have different --

Commissioner O'Neal: For September and October?

Mr. Jordan: September and October and we would go to the 1.2 rate around the 1st of November. Some of the other carriers' submissions have slightly later assumptions with reaching the 1.2. I think it can be generally said, with a fair degree of certainty, that everybody is thinking about calendar 1978 as basically a 1.2 million-barrel-a-day year.

That's a fairly sound assumption, but we're talking about a pipeline that's just getting started up and there's a lot of uncertainty about just when we will reach particular rates.

We appreciate the opportunity to submit our views to the

Commission. These are difficult questions. We believe that the approach which we have suggested is a fair and reasonable one and we are convinced that the carriers, regardless of the quibbles about methodology and efforts, decimal points, debt equity ratios, are not, in any case, seeking a return which is unfair or unreasonable.

We are also convinced that we have, to the very best of our ability, tried to comply with established ICC methodology. We would trust that the Commission would allow these tariffs to go into effect, that it would initiate prompt proceedings, as necessary, on the investigation front with respect to rates, on the valuation front with respect to the valuation and in terms of the 308 proceeding, to bring all these thorny problems to a prompt conclusion.

Commissioner O'Neal: Thank you.

Mr. Cleary, for 15 minutes of re-rebuttal.

Mr. Cleary: I averted, I think, before to the parent subsidiary relationship. But since the carriers are continuing to ask that the standard be deviated from, at least to get away from the 8 percent to the value of the standard because capitalization of the companies requires more of the individual companies, and then they want to hide the high return de facto earned on the equity to the pipeline, by saying, "Well, that's not really right, that's a phoney number"; the fact is, it's dollars related to the equity investment. They want to avoid that, then, by leaping to the parent companies. They're jumping again the standards.

I go back to the 1940 case, the first case the Commission ever had to reduce pipeline rates and gathering charges case. And at page -- well, I've got a little problem here reading what page it is -- about three pages from the end, second page right before the tables.

The Commission was posed with this same thing, about penetrating through to the parent companies. They said this -- and I indulge here with a rather lengthy quote, but I think it's very important -- "In the determination of the question whether the rates and charges of these common carrier Respondents are lawful, we cannot attach any controling weight to the fact that the Respondents or their beneficial owners have seen fit to pay charges from the one pocket to the other, or

to operate their common carrier and industrial properties in such manner that the carrier system is virtually a plant facility of the larger producing, manufacturing and selling industry.

"These facts, if they be facts, are immaterial in this proceeding. More than mere bookkeeping is involved. The measure of a reasonable rate for a common carrier cannot be made to depend upon such consideration.

"Whatever the relations between the pipelines and the oil companies which beneficially own them, Congress requires all rates tendered to the public by these common carriers to be just and reasonable and no more.

"Every carrier subject to the Act must maintain a schedule of just and reasonable charges, regardless of whether the public generally has been or is in a position immediately to avail itself of the service.

"As will be seen hereinafter, the general measure of the rates of many important respondents is accepted. And it is no answer to such a finding that independent shippers are few, or that they are not using the service offered, when the rates demanded are excessive."

Now, the Commission said that in 1940. It's the same case where they said 8 percent on valuation is the standard. And you repeated that consistency and fairness will not permit you to deviate from it. You said it in December, as I indicated.

And they have talked about Mr. Jeter checking out the computations, and what the source was. I think the investigation really might penetrate as to who prepared those numbers, and what did they have in mind? Why didn't they put a footnote when they're telling Mr. Hungate or someone else on the Hill what the numbers mean?

And I'm very serious when I say the end report to Congress of this Commission has reported dollars invested in TAPS as carrier property, and measured returns of pipelines to tell the Congress how profitable pipelines are. Yet, it's got $3 billion or so, as of the end of 1976 -- already had been invested up there, and it might have been as much almost at the end of '75.

In Ex Parte 308, Williams Pipeline hired Mr. Robert R. Nathan to put some figures in. And he wanted to compare Williams with the average pipeline. He said, "My gosh, you could not do this, because the apparent return, according to Commission statistics and transport statistics, which are then used in the report to Congress, show a decline in the profitability in the last three years.

It hasn't occurred, except because of the inclusion of the investment in Alaska. Not one penny of revenue has been flowing, yet the numbers have. This Mr. Nathan saw this was misleading, and he threw those numbers out. Unfortunately, the Bureau witness that was submitted from the Commission in the proceeding didn't do that, didn't throw the numbers out, and

there is some problem.

We have worked our way through that in Ex Parte 308. Hopefully, it will be an on-the-record proceeding. I don't think it is, according to what the Judge has said, and what has been affirmed by Commission order.

And I don't see how these people think they're going to get the protection they think they're entitled to. I think it should be an on-the-record proceeding, but it isn't now. All right.

Mr. Jeter could have been well hired to go back to the underlying accounts and reports of these carriers that the Commission used in its 1940 report. Or, he could have gone to the figures for 1947, '48, that were in the subsequent report, in the same reduced pipeline gathering rate case.

I think he would have found, yes, some of these pipelines were incurring debts. Where did they record it, above the line or below the line? Anyone who looks at an annual report of the ICC interests is below the line. Where was it used in the Commission's decision? It wasn't in there at all; it was below the line.

In computing the return of 8 percent on valuation, the Commission has always used this. The only thing they have got -- I guess what they're referring to is the unreported Administrative Law Judge decision, the one that Mr. Schwartz participated in.

One can go to the heading of that one. It's a Griffith, Indiana case, I guess it is. There was an Administrative Law Judge decision. Well, the first page of it shows there's no opposition in the case. He was appearing for Lakehead Pipeline.

It's very interesting to see the intricate relationship between Lakehead and Interprovincial. The Canadian Energy Board has had the same problem this Commission faces, looking at -- the same way as in 308 -- what is reasonable rates?

They did not defer and say, "We'll go to some other case we will have in a 308 type proceeding". They said, "No, we will look at it". They found, "We'll deviate; we're going to change this idea of a valuation base."

They're not using it in Canada now. They've gotten away from it. Because they've found, if you start inflating the base, how do you get a comparable earning? Because comparable earnings in the economy don't have insurance against inflation that comes from an inflated rate base.

So, you've got to take assumptions upon assumptions. It's just not workable.

The fact is that case after case by this Commission has not included interests above the line. The only one they talk about is -- I guess they're referring to petroleum crude oil at Griffith, Indiana to New York State points, Docket 352. Mr. Schwartz entered an appearance.

Ashland Oil Company had been a Protestant and they didn't appear. I think they had some pipelines. There was an appendix -- I don't know what the source of it is, I haven't read the record in that case but, admittedly, there is a little table there that computes and has some interest above the line, the only example.

And that decision -- of course, there were no exceptions, obviously, to the Administrative Law Judge decision. It became the order of this Commission, as a matter of law, apparently sometime close to the end of the year. I guess you could say, since the service date on the decision was October 14, it would have been before the Williams case was decided and, therefore, the Williams case would clearly overrule it, if it was in the -- in the recognition of anyone deciding the cases.

Judge Nacy had this question but, specifically, as I indicated on the seven percent, and he found flat out you do not deduct the interest before computing an ICC return even though the carriers have been arguing that in the Key 9 case --he said the decision in that case--and he was referring

to the Williams case, "The decision in that case is presently being appealed." This was between the division decision and the entire Commission.

"I conclude that interest should not be included as an expense item for the purpose of the present proceeding. However, the rate of return is expected to cover serving of debt." That case also became a Commission decision. It was affirmed by Division 2, Commissioners Hardin, O'Neal and Christian, an order served by October 21, 1976.

The only thing they've got is a couple of letters and a few mistakes I think that were in Commission decisions up to Congress -- or, letters up to Congress. Now, what about this eight percent standard? We think it is a standard. They know what it is.

I think an order that says you haven't followed that standard -- I don't even think the Commission has to say that now, just suspend. It's obvious they haven't voluntarily complied with that and it's about time they did. They have come in here and said we recomputed, if we add the interest back in and see what the effective rate of return would be. We have it for three companies, only three of them; Exxon, 12.25 -- these are the numbers given today, they appeared in their pleadings -- Exxon, 12.25; Amerada Hess, 14.9; Sohio, 12.9; all of them substantially above the eight percent standard.

Apparently they should have hired their accountant to make the computation and tell them the difference between 8 and 12; 8 and 14. And I suggest they can figure it out. They can come back with a tariff that will not give them anymore.

The tax flowthrough is extremely important. It's not as important right off the bat but it is important because it is cost-free capital. And the Exxon filings of the SEC -- and the same thing, I'm sure, must be true with respect to the others -- show significant available capital to them at no cost.

Now, that must be taken into consideration if you impute taxes and the FPC has done that. None of them have talked about that. They know that's the rule.

The question of refunds; I think it is clear, from what's been presented to you here today. I couldn't say it half as eloquently as Mr. Gale Lewis did, about the natives in Alaska. Obviously, the State of Alaska has funds that are being planned to come to them through reasonable rates.

The natives of Alaska will not have the schools and all the other resources that they are supposed to have. All this will be deferred. That's the irreparable injury. Whenever the Interstate Commerce Act is violated and it's clearly unlawful, there should be a suspension regardless of who shows the irreparable injury, as I indicated before.

The refund provision, we hear them telling us that all of their experts tell us their cost of capital is 13-14 percent. Now, that's not on this record, but they -- you see, they want to bring that part of the nonrecord in here and have you change your mind.

How do they want us to provide dollars and get back eight percent? We provide them dollars which make available to them capital for the intervening period which they say is worth 12 and 13 -- that's what they would have to pay for it, go out and buy it at 13 and 14 percent. They'll get it from us. Yes, we'll give you back 8 percent. That's irreparable damage.

I think if there is even a concept ever at this Commission, that any reparation is less than the cost of capital to the company that is paying the reparation, it is a questionable constitutional taking without due process. The ratio has never been raised but it should be.

Thank God the Commission at least did say you will follow in all proceedings the 90-day treasury. That makes it a little bit better but it's not adequate. It is still irreparable damage.

Moss, Moss versus CAB is a rather unique case, to say the least. There was a specific formula presented by an airline. There were tariffs that were rejected. The Commission then prescribed other rates and Congressman Moss

thought that what they were prescribing was the result of a specific formula offered by one of the airlines. And as I understand it, that's just about what happened. It's a unique case.

To take that case and say it undercuts the Commission's power to say"Read our 1940 decision and read all of the subsequent ones and come back with a tariff that doesn't give you more than 8 percent return on valuation or, if you feel compelled to go to something else, I think it would be wrong. I do not understand why the Bureau even went to 10 percent because the fact is the 8 percent will pay the interest cost of each and every one of these pipelines.

They may say something to the contrary but the numbers don't add up. They have their interest cost they reported to you, 8 percent on the valuation mainly because, as I said, the valuation was more than the original cost and a lot more than their debt. 8 percent is enough to pay the interest for every one of them and give them some flow into equity and our $3.87 rate that would flow contemplates taxes with respect to each.

Don't deviate from priorities. They say it. I say the same thing. It is a deviation when you go from 8 to 10. 8 percent on value would be no deviation. They would have no argument, in my opinion. The law is clear. We know they are taking it to court.

No matter what this Commission writes, they are going to try and find something that they don't like about it, if the Commission doesn't give them every single penny they have published.

Ex Parte 308, I reiterate, is a questionable relief. It is a questionable proceeding. You are asking that a rule-making proceeding, where there are not rights of the adjudicatory proceeding nature in normal cases be used to decide these very important issues, a fact I presented in Williams. And, unfortunately, 308 has gone forward not very fast.

Thank you.

Commissioner O'Neal: Thank you. Mr. Kaplan, you have five minutes for your rebuttal.

Mr. Kaplan: Mr. Chairman, Members of the Commission, let me just open by discussing the fact that we did file a brief here today, and I move for you to consider that brief.

Unfortunately, it would not have been possible to submit that pleading in any time to the arguments prior to seeing the arguments raised by Respondents. It is a traditional role

in most courts in briefing an issue that a reply to the response is permitted. Arguments were raised here for the first time, very serious arguments, ones which we think serious that they should make the challenge. We don't think that they should be given serious consideration.

You have heard a challenge to your very jurisdiction, the issue of rate prescription. We, also, were very upset about what we feel are material and factual errors and omissions. I will discuss those in a moment.

And also we got some information about how these carriers calculated their rates, for the first time, which we did not have before. So, we addressed only those issues which we did not have an opportunity to address before. And we think, under Rule 2 of the Commission's Rules, calling for a liberal construction, that the Commission should consider it on this very important issue.

On the prescription issue, I think it is very important, and I might clarify the point I made earlier. If the Commission seeks to suspend these rates, that the order not exceed or not even bring the suspension -- the prescription issue into question which I do not think it has to.

I think all you have to do -- all the Commission has to do is suspend the rate subject to refiling tariffs not exceeding lawful limits. And that's all you have to say. I would then go on and discuss the possible lawful limits and,

I think, under any interpretation of lawful limits, as the Protestants have made, that these rates could not exceed rates which would be within $2, now, of what was charged. But I think discussing the applicable limits,the standards in the early pipeline cases,the Williams Brothers,that I believe that these carriers could then, themselves, figure out what should be a lawful rate. And if the Commission decides to suspend the rates to be filed, with a reasonable concise, but clear, discussion of what the law is, they can determine what the rate should be.

And those new rates, of course, would be, I imagine, subject to the same challenge if, in fact, the carriers once again try to get excessive returns.

And of course, the Moss -- the rates set in the Moss Case, were set right in that proceeding. We are not asking you to do that. You have some law on rate of return. Rely on it. It is enough to suspend these rates.

Now, as far as the risk to the non-owner shippers, such as Union, Congress took care of that, as I discussed earlier. I just wanted to cite to the Commission the course the commodities clause covering rail shippers, 49 U.S.C. Section 1, Paragraph 8. Most rail shippers cannot ship goods they manufacture, if it is an integrated company, and I suppose they would be in the position of Union, which has now oil apparently to ship. I wish them luck in finding some oil to

ship, but so long as they don't have any, they are just like a rail carrier.

Congress determined that the suspension power should nonetheless apply. Limit it it to seven months. But Congress made that determination. I don't think that we need be concerned with that possibility.

The challenge to the rates filed by the Commission -- to the Commission's power to suspend rates fails to cite a number of cases which we did in our reply brief, in which there is no question that initial rates were suspended and there was no underlying rate, or no changed rate, or no prior service that was not covered. The machinery from Salt Lake City Case, 304 ICC 286, cited at page 9 in our brief, that was newly acquired operating authority.

In Clay, from Grayville, Wyoming, 314 ICC 705, also on page 9, not only were the rates suspended one time, they were suspended four times. The carrier never offered that service before.

Also, Warren, from Canada and New York to Florida, it was newly acquired operating authority to ship wine to Tampa, Florida, and that service had never been offered.

Commissioner O'Neal: Mr. Kaplan, thank you, your time has expired. Mr. B[illegible]c you have five minutes on your rebuttal.

Mr. Lewis: I will very briefly respond to the ARCO rebuttal. They, once again, don't understand the natives' interest or perhaps that the natives really have any interest.

The concern of the Alaska natives in this proceeding is based directly upon the present value of the wellhead. Any deferral in wellhead value, awaiting the outcome of lengthy proceedings in this case, is going to defer forever in a way that will never be recovered, the only value that the Arctic Slope Eskimos and the other Alaska natives got from the Settlement Act that gave these oil companies Prudhoe Bay. The only value in the Arctic Slope's 5 million acres is that someone is prepared to come in right now and pay money to the Arctic Slope Eskimos for the right to explore and lease and develop their oil reserves.

They are not going to get that money until the tariff issue is settled in a way that ensures an adequate return at the wellhead. They are not going to get jobs until there is someone there hiring them in order to go out on the tundra and develop those reserves. That's not going to happen until the price at the wellhead goes up. And that's not going to happen for a number of years, it's quite obvious, if these proceedings are continued and no rate adjustment is made until the conclusion of those proceedings.

The incredible impact on the State of Alaska's budget will be felt immediately and irreparably by Alaska natives.

The schools and the restoration of the fisheries, which the State of Alaska is legally obligated to pay for and provide to Alaska natives, will obviously not happen if Alaska is waiting for some time in the future for a refund.

These basic, fundamental things, these basic, fundamental fairnesses, will not be dealt with, as long as these unlawful rates are in effect, even though the money might be paid over some years in the future.

Arctic Slope Eskimos appeal to the equity of this body as well as to its common sense. And I'll let you run through a couple of those items. These don't require evidentiary hearings. The TAPS companies are asking this Commission to allow them to amortize replacement cost of their construction at a rate of 6 percent a year for 25 years. They are also asking simultaneously that the Commission allow them to amortize removal costs in 25 years. So it is quite obvious that it won't be simultaneously replaced and removed in 25 years. That does not require an evidentiary hearing.

Secondly, the carriers are asking that interest be treated as a deductible. Then they are asking for a return on that same interest. They ask the Commission to ignore the Williams Brothers -- the Williams Case -- because in that case, the pipeline company merely automatically treated interest the way it ought to be treated. Because it was automatically treated that way, by the pipeline company, the TAPS carriers

say, you shouldn't pay any attention to it.

Rather, they suggest that you should rely on other, many other rates, which weren't even contested, obviously because the carrier and the shipper were the same person and had agreed in advance as to what the tariff would be and that's why it was not protested.

Now, they also argue that in computing debt equity ratio that the Commission ought to look to the debt equity ratio of the parent. But, they don't permit -- they ask the Commission not to take into account, the tax benefits derived by the parent from the subsidiaries, the tax benefits of a subsidiary -- and they also ask the Commission not to take into account the parents' cost of capital, but merely the parents' cost equity, debt equity ratio.

Now, throughput act of 1968, counsel very carefully avoided any comment on what he or his clients believe the throughput would be one year from now, after one year from now. It's obviously going to be more than 1.2.

The Commission does not live in a vacuum. You read the papers. You know what's going on. You've had other submissions. The submissions that have been presented as part of this record, from the carriers on, SEC submissions, and all of the other make it quite obvious that throughput is not going to be 1.2 million more than a year from now.

Lastly, the field life, there is information before the

Congress. It's been submitted to the Department of Interior, the energy departments, to the President. It has been repeated time and time again by executives of various oil companies, about the additional potential of oil on the Arctic Slope, and they always talk in terms of 30 to 40 to 50 billion additional barrels.

Commissioner O'Neal: Thank you, Mr. Lewis.

Mr. Greenberg, you have ten minutes on re-rebuttal.

Mr. Greenberg: Thank you. I guess the first thing to say here is, it's about time somebody defended Commissioner Stafford with regard to the response that has been submitted to the Hungate Committee. That is why we included as an exhibit, in the attachments we gave you, Exhibit 8, the two-page, I guess, answer, submitted by Commissioner Stafford, then chairman.

I direct your attention to page 2 of that exhibit, in which Commissioner Stafford points out specifically that in Schedule A,interest expense is not deducted from that income; in Schedule B, interest expense is deducted from that income.

It is clear that the Commission, in sending these figures to the Hungate Committee, was only giving an alternative basis upon which the various figures could be computed. It was making no representations as to the authenticity or how they will be used in ratemaking standards.

What we see here is that ARCO and Exxon, in their appendices, have attached this much material (indicating) -- excuse me, I have a pack of -- it's this much material (indicating) on how the various items could be computed.

What they don't give you is this much material (indicating), which was also in your submission terms, in which it is clear that what we're talkir about was alternative methods of computing rates of return, whether with or without interest.

And we've tried to make it very clear that there is ample

precedent in every contested case that has been before this Commission that interest has been treated as part of the return on valuation.

In our protest, on pages 28 and 29, we have run the figures from the reduced rates and pipeline gathering charges case. In the Menulusa case, we've run the figures. In the Williams Brothers case, which we have reread and properly stated in our brief that it did not cancel the proposition. Happily, it does cancel the proposition.

It is clear, every single contested case treats interest exactly the same way, we're suggesting it ought to be treated here today.

One additional distinction that should be made, perhaps, as to the Moss case, aside from the fact that it clearly is not a prescription case, is that the D. C. circuit was most unhappy about the way the CAB was dealing with the offering by the airlines. It was an ex parte proceeding.

No one except the airlines and the CAB commissioners was present at that meeting. In fact, they had the audacity to exclude Congressman Moss from those deliberations. I suggest that this was of some concern to the circuit.

If you are asking the Commission to prescribe a rate in this proceeding, we wouldn't ask them to accept the figures that they have presented here today. We would ask them to disregard this nonsense about 25 year service life, for

depreciation purposes or for removal and restoration costs. We would ask them to disregard the normalized tax treatment which they have accorded themselves.

We would also ask to the Commission to disregard all the known costs as of this date, which are attributable to inefficient management, such as the reweld problems which have been well publicized in the Sag River difficulties. But we're not asking for that.

We're asking to take their figures, which they have put before you, and use your classical method of rate of return valuation and come in with an appropriate rate. That's all we're asking for.

Thank you.

Commissioner O'Neal: Questions?

(No response.)

Thank you. Thank all of you for participating in this oral argument. This concludes the oral argument. We are adjourned.

(Whereupon, at 3:59 p.m., the proceedings were concluded.)

Exhibits In Aid of Oral Argument Submitted By ICC Bureau of Investigations And Enforcement, June 27, 1977

[Caption Omitted in Printing.]

I N D E X

	Exhibit
Recoverable Oil and Gas Resources in Alaska	1
Basic Issue for Decision	2
Proposed Rates Produce an Excessive Return of at Least 49% on Average Equity Investment	3
Proposed Rates Will Allow Excessive Returns	4
Exxon Pipeline Company's TAPS Tariff Computation	5
Sohio Pipe Line Company Projected Return on Equity	6
Extract from No. 35533, Petroleum Products, Williams Brothers Pipe Line Company, Decided December 3, 1976	7
Response of Chairman Stafford of November 10, 1975, to the Questionnaire Submitted by Congressman Hungate	8
Resulting Rates of the Trans-Alaska Pipeline System Based on Operating Expenses, Depreciation, Interest, and Removal and Restoration Costs Reported by the Carriers	9

EXHIBIT 1

RECOVERABLE OIL AND GAS RESOURCES IN ALASKA

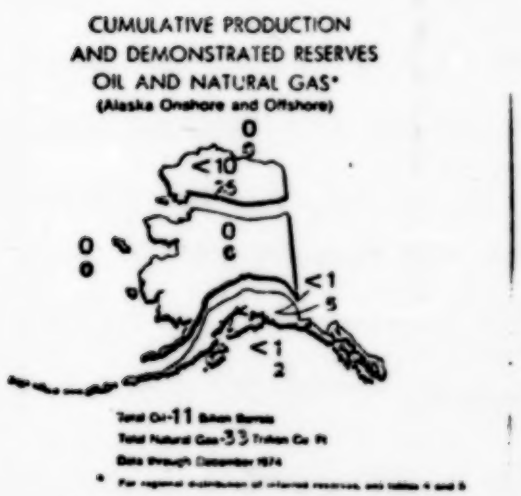


FIGURE 10.—Cumulative production and demonstrated reserves of oil and natural gas by regions for Alaska, onshore and offshore to 200 metres.

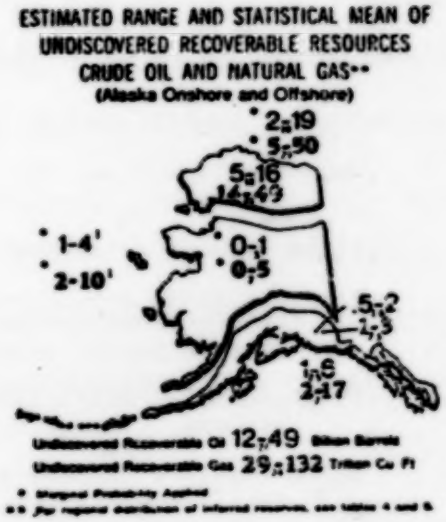


FIGURE 11.—Undiscovered recoverable resources of crude oil and natural gas for Alaska onshore and offshore to 200 metres. (Ranges of values were derived by Monte Carlo methods from estimates made by the Resource Appraisal Group and reported at 95-5 percent probability levels in billions of barrels for oil and trillions of cubic feet for gas.)

[1] Estimates reported at the 75 and 25 percent probability levels because, in these areas, these levels are judged to be more applicable for some planning purposes. It must also be noted that in frontier areas, lacking discovered indigenous or adjacent recoverable hydrocarbons, uncertainty is sufficiently great as to weaken greatly the estimates at extreme ranges. For purposes of comparison with other recorded ranges, the 95-5 percent probability range in offshore Atlantic is 0-6 billion barrels of oil and 0-22 trillion cubic feet of gas (fig. 11); in the Bering Sea it is 0-8 billion barrels of oil and 0-10 trillion cubic feet of gas (fig. 12).

Note: Oil estimate in boldface, gas estimate in italics.

Source: "Geological Estimates of Undiscovered Recoverable Oil and Gas Resources in the United States," Geological Survey Circular 725, prepared for the Federal Energy Administration by the U.S. Geological Survey, U.S. Department of the Interior, pp. 32-33 (1975).

Exhibits in Aid of Oral Argument of the I.C.C. Bureau of Investigations and Enforcement

EXHIBIT 2

BASIC ISSUE FOR DECISION

SHALL THE COMMISSION ALLOW THE PIPELINE COMPANIES THE OPPORTUNITY TO EARN UP TO 10 PERCENT OF VALUATION ACCORDING TO THE ESTABLISHED FORMULA USED IN PRIOR CASES, NAMELY,

$$\frac{\text{INTEREST} + \text{AFTER TAX RETURN FOR EQUITY}}{\text{VALUATION}} = 10\%$$

OR SHALL THE COMMISSION FOR THE FIRST TIME IN ANY REPORTED CASE ALLOW THE CARRIERS TO EARN AS MUCH AS 7 PERCENT OF VALUATION JUST FOR EQUITY ACCORDING TO A FORMULA IT HAS NEVER APPROVED FOR PIPELINE RATEMAKING PURPOSES, ALTHOUGH USED BY A LAW JUDGE IN ONE ISOLATED CASE, NAMELY,

$$\frac{\text{AFTER TAX RETURN FOR EQUITY}}{\text{VALUATION}} = 7\% \ ?$$

EXHIBIT 3

PROPOSED RATES PRODUCE AN EXCESSIVE RETURN
OF AT LEAST 40% ON AVERAGE EQUITY INVESTMENT

PIPELINE CARRIEPS' PROPOSED FORMULA:

$$\frac{\text{AFTER TAX RETURN FOR EQUITY}}{\text{VALUATION}} = 5.8\%$$

RESULTING TOTAL PROPOSED RETURN FOR EQUITY:

AFTER TAX RETURN FOR EQUITY = 5.8% x VALUATION

AFTER TAX RETURN FOR EQUITY = 5.8% x $9,747 million

AFTER TAX RETURN FOR EQUITY = $ 568.4 million

EQUIVALENT PERCENT RETURN ON EQUITY INVESTMENT:

Since the equity investment in TAPS will be no more than 15% of the total invested capital of $9,295 million, or $1,394 million, the pipeline carriers' total proposed return for equity of $568.4 million equals $568.4 million ÷ $1,394 million, or an average return on equity of 40.7%.

Exhibits in Aid of Oral Argument of the I.C.C. Bureau of Investigations and Enforcement

PROPOSED RATES WILL ALLOW EXCESSIVE RETURNS
IN 1978 AT 438 Million B/ Yr. Throughput
(Million)

(1) Carrier	(2) Implied Return for Equity At Proposed Rates		(3) Interest	(4) Percent Return on Valuation Purported[1]	True[2]	(5) Percent Return on Equity 3
Sohio	(33.34%)	$ 175.0	$ 252.5	5.4	13.2	37.6
Arco	(21.00%)	112.6	140.2	5.5	12.3	38.4
Exxon	(20.00%)	127.5	116.4	6.5	12.5	45.7
BP	(15.84%)	93.4	118.9	6.0	13.8	42.4
Mobil	(5.00%)	30.9	32.7	6.3	13.1	44.1
Union	(1.66%)	10.2	9.6	6.3	12.2	44.3
Phillips	(1.66%)	10.3	10.3	6.4	12.7	44.8
Amerada Hess	(1.50%)	8.5	11.4	5.8	13.6	40.5
TOTAL		$ 568.4	$ 692.0	5.8	12.9	40.7

1) Col. 2 ÷ (Percent ownership X $9.747 billion)
2) (Col. 2 + Col. 3) ÷ (Percent ownership X $9.747 billion)
3) Col. 2 ÷ (Percent ownership X 15% X $9.295 billion) or $1.394 billion.

TRANS-ALASKA PIPELINE SYSTEM
PROPOSED RATES WILL BRING EXCESSIVE RETURNS FOR EQUITY
AS ADJUSTED - YEAR 1978
($ Millions)

	Total 1978 (100%)	Sohio (33.34%)	ARCO (21.00%)	Exxon (20.00%)	BP (15.84%)	Mobil Alaska (5.00%)	Union Alaska (1.66%)	Phillips (1.66%)	Amerada Hess (1.50%)
1 Operating Expenses	$ 409.0	135.2[3]	90.3	80.0	64.7	19.7	6.5	6.3	6.3
2 Depreciation & Amortization[1]	364.9	126.2	77.2	73.7	52.0	18.1	5.8	6.1	5.8
3 Removal and Restoration[2]	42.2	14.0	8.9	8.4	6.7	2.1	.7	.7	.7
4 Reported Interest	692.0	252.5[3]	140.2	116.4	118.9	32.7	9.6	10.3	11.4
5 Grand Total	1,508.1	527.9	316.6	278.5	242.3	72.6	22.6	23.4	24.2
6 Implied Return for Equity Before Taxes at Proposed Rates[4]	1,206.8	371.5	239.1	270.7	198.3	65.6	21.7	21.8	18.1
7 Imputed Income Taxes[5]	638.4	196.5	126.5	143.2	104.9	34.7	11.5	11.5	9.6
8 Implied Return for Equity After Taxes	568.4	175.0	112.6	127.5	93.4	30.9	10.2	10.3	8.5
9 Proposed Rates ($/B)	6.20	6.16	6.04	6.27	6.35	6.31	6.09	6.22	6.44

1 Based on 25 year service life
2 ($1.049 billion ÷ 25 years) X percent ownership
3 As amended by Sohio in its letter of 6/13/77
4 (Line 9 X 438 mill. B/Yr. X percent ownership) - Line 5
5 52.9% X Line 6.

Exhibits in Aid of Oral Argument of the I.C.C. Bureau of Investigations and Enforcement

EXHIBIT 4
Page 2 of 3

EXHIBIT 5

EXXON PIPELINE COMPANY'S T. S TARIFF COMPUTATION

	$\bar{M}$$				
	1978	1979	1980	1981	1978-1981 Average
Revenue	572.0	567.4	563.2	571.5	568.7
Operating Expense					
Alyeska Field and Administrative	44.8	47.0	49.4	57.1	49.6
Topping Plant Fuel and Natural Gas	4.5	4.6	4.7	6.1	5.0
Exxon Pipeline Company Administrative	.7	.7	.8	.8	.8
Ad Valorem Taxes	31.9	31.9	31.9	32.8	32.1
Book Depreciation	73.7	73.7	73.7	75.8	74.2
TAPS Dismantling	16.4	16.4	16.4	16.4	16.4
Interest Expense	114.5	106.7	98.7	92.6	103.2
Taxable Income					267.4
Provision for Income Taxes					149.1
Earnings					138.3
Throughput - $\bar{M}$B	87.60	87.60	87.60	100.22	90.75
ICC valuation					1,976.3
Return on Valuation - %					7.0
Tariff Rate - $/bbl.					6.27
True Return on Valuation					12.2%
Estimated Return on Equity Investment 1/					49.6%

1/ Based on 20% ownership and estimated 15% average equity in $9.295 billion total investment.

Exhibits in Aid of Oral Argument of the I.C.C. Bureau of Investigations and Enforcement

EXHIBITS

SOHIO PIPE LINE COMPANY
PROJECTED RETURN ON EQUITY BASED ON
DATA FURNISHED BY COMPANY
($ MILLIONS)

	1978	1979	1980	1981	1982
1 Cost of Property (1)	$3169.0	3395.4	3395.9	3395.9	3395.9
2 Accumulated Depreciation	167.7	294.5	431.3	568.1	704.9
3 Property, Net	3001.3	3100.9	2964.6	2827.8	2691.0
4 Debt (2)	2714.8	2889.2	2816.3	2675.3	2527.0
5 Owner's Equity	286.5	211.7	148.3	152.5	164.0
6 Return on Equity ($)	$ 175.0	176.5	286.3	293.6	301.2
7 " " " (%)	61.1%	83.4%	193.0%	192.5%	183.6%

1) Capital expenditures plus capitalized overheads and interest estimated by carrier.

2) Based on interest expenses at 9.3 average rate; estimated by carrier.

Exhibits in Aid of Oral Argument of the I.C.C. Bureau of Investigations and Enforcement

SOHIO PIPE LINE COMPANY
PROJECTED RETURN ON EQUITY BASED ON
DATA FURNISHED BY COMPANY
($ MILLIONS)

	1978	1979	1980	1981	1982
1 Shipments (Millions of BBLS)	146.0	146.0	188.6	188.6	188.6
2 Revenue (@ 6.16 per bbl)	$899.4	899.4	1,161.8	1,161.8	1,161.8
3 Operating Expenses	135.2	133.7	141.2	138.9	136.6
4 Depreciation & Amortization	126.2	126.8	136.8	136.8	136.8
5 Removal & Restoration	14.0	14.0	14.0	14.0	14.0
6 Interest	252.5	250.2	261.9	248.8	235.0
7 Total	527.9	524.7	553.9	538.5	522.4
8 Return on Equity Before Income Taxes	371.5	374.7	607.9	623.3	639.4
9 Taxes (line 8 X 52.9%)	196.5	198.2	321.6	329.7	338.2
10 Return on Equity After Taxes	$175.0	176.5	286.3	293.6	301.2

No. 35533

EXHIBIT 7

EXTRACT FROM PETROLEUM PRODUCTS, WILLIAMS BROTHERS PIPE LINE COMPANY, DECIDED DECEMBER 3, 1976

Set forth below is the computation of WBPL's earnings and rate of return on valuation for the years 1970, 1971, 1972, and 1973. This table goes back to 1970 because the complaint brings the reasonableness of WBPL's rates into question as far back as August 20, 1970. It extends through 1973 because the record and the pleadings have concerned themselves with 1973 as well as the earlier years. Since the increased rates here under investigation became effective at about the beginning of 1972, the table encompasses a sufficient time period to show the reasonableness of WBPL's earnings under the increased rates as well as under the previous level.

	1970	1971	1972	1973
Operating revenues[a]	56,963,249	56,952,929	60,523,560	63,309,474
Operating expenses	23,822,092	30,192,321	32,754,442	34,651,281
Interest expense	13,120,000	13,319,456	12,716,228	12,116,884
Income tax[b]	6,552,555	6,451,625	7,225,387	7,939,828
Income after taxes[c]	20,518,602	20,334,863	20,543,711	20,719,365
Valuation[d]	211,143,500	226,706,100	229,389,100	238,195,500
Return on valuation	9.72%	8.96%	8.96%	8.70%

[a]Includes incidental revenues.

[b]Operating revenues, less operating expenses and less interest expense, times statutory rate of 48 percent.

[c]Operating revenues less operating expenses and less income tax.

[d]Final valuation for 1970 and tentative valuations for 1971, 1972, and 1973, from Valuation Docket No. 1423.

As may be seen, WBPL's return on valuation was below the 10-percent level for each of the years in question. Accordingly, we conclude that WBPL's earnings were not excessive for any of these years, and that its overall rate level for these years was just and reasonable.

Exhibits in Aid of Oral Argument of the I.C.C. Bureau of Investigations and Enforcement

EXHIBIT 8

RESPONSE OF CHAIRMAN STAFFORD OF NOVEMBER 10, 1975 TO THE QUESTIONNAIRE SUBMITTED BY CONGRESSMAN HUNGATE, CHAIRMAN OF THE SUBCOMMITTEE ON THE ACTIVITIES OF REGULATORY AGENCIES HOUSE COMMITTEE ON SMALL BUSINESS

QUESTION NO. 5

ICC figures on the average return on investment for companies owning oil pipelines for the last five years. Also, any ICC action over the last five years taken on rate regulation of pipelines.

ANSWER:

PART I - Figures on Average Return: In response to the request for average return on investment we are transmitting Schedules I through V and Schedules A through G.

Schedule I is a four-year summary of the average rate of return on carrier's valuation as determined by the Interstate Commerce Commission. The summary information in this Schedule is from Schedules II through V.

Schedules II through V show, by years, each carrier's valuation, net income and rate of return on valuation. Carrier valuations are from reports issued by the Commission on each individual carrier. Net income is from Annual Report Form P submitted yearly by each carrier.

Schedules A and B are five-year summaries of rate of return on net investment. The summary information in these schedules is from Schedules C through G and reflect the rates of return on net investment, giving effect to interest payments on long-term debt. In Schedule A interest expense is not deducted from net income. In Schedule B interest expense is deducted from net income.

Schedules C through G show, by years, net investment in carrier property (investment less accrued depreciation and amortization), net operating income less Federal income tax (statutory rate), net income (operating income less interest expense and Federal income tax) and rates of return on these two net incomes. All information in these schedules, except Federal income tax which was computed at a statutory rate of 48 percent, was taken from the Annual Report Form P submitted yearly by each carrier.

RESULTING RATES OF THE TRANS- ALSKA PIPELINE SYSTEM
BASED ON OPERATING EXPENSES, DEPRECIATION, INTEREST, AND REMOVAL AND RESTORATION COSTS
REPORTED BY THE CARRIERS TO THE BUREAU OF ACCOUNTS FOR THE YEAR 1978
AND AN OVERALL 10% RETURN ON VALUATION
($ millions)

	Total 1978	Sohio	ARCO	Exxon	BP	Mobil Alaska	Union Alaska	Phillips	Amerada Hess
1. Operating Expenses	$ 409.0	135.2	90.3	80.0	64.7	19.7	6.5	6.3	6.3
2. Depreciation[1]	364.9	126.2	77.2	73.7	52.0	18.1	5.8	6.1	5.8
3. Removal & Restoration[2]	41.9	14.0	8.8	8.4	6.6	2.1	0.7	0.7	0.6
4. Interest	692.0	252.5	140.2	116.4	118.9	32.7	9.6	10.3	11.4
5. Sub-total	1,507.8	527.9	316.5	278.5	242.2	72.6	22.6	23.3	24.2
6. Return for Equity[3]	282.7	72.5	64.5	78.5	35.5	16.0	6.6	5.9	3.2
7. Imputed Income Taxes[4]	317.5	81.4	72.4	88.2	39.8	18.1	7.4	6.6	3.6
8. Grand Total	$2,108.0	681.8	453.4	445.2	317.5	106.7	36.6	35.8	31.0
9. Resulting Rates[5] $ Per Barrel	4.81	4.67	4.93	5.08	4.58	4.87	5.03	4.92	4.71

1/ Based on a 25-year service life and varying assumptions on total investment.

2/ Removal and restoration costs of ARCO, Exxon, BP, and Mobil are adjusted to pro rata share of the alleged $1,049 million one-time cost over 25 years, consistent with the treatment of this expense by the other carriers.

3/ (Percent ownership x 10% x $9.747 billion) - Line 4.

4/ Percent ownership x [(Line 6 ÷ 47.1%) - Line 6].

5/ Line 8 ÷ 438 million B/yr.

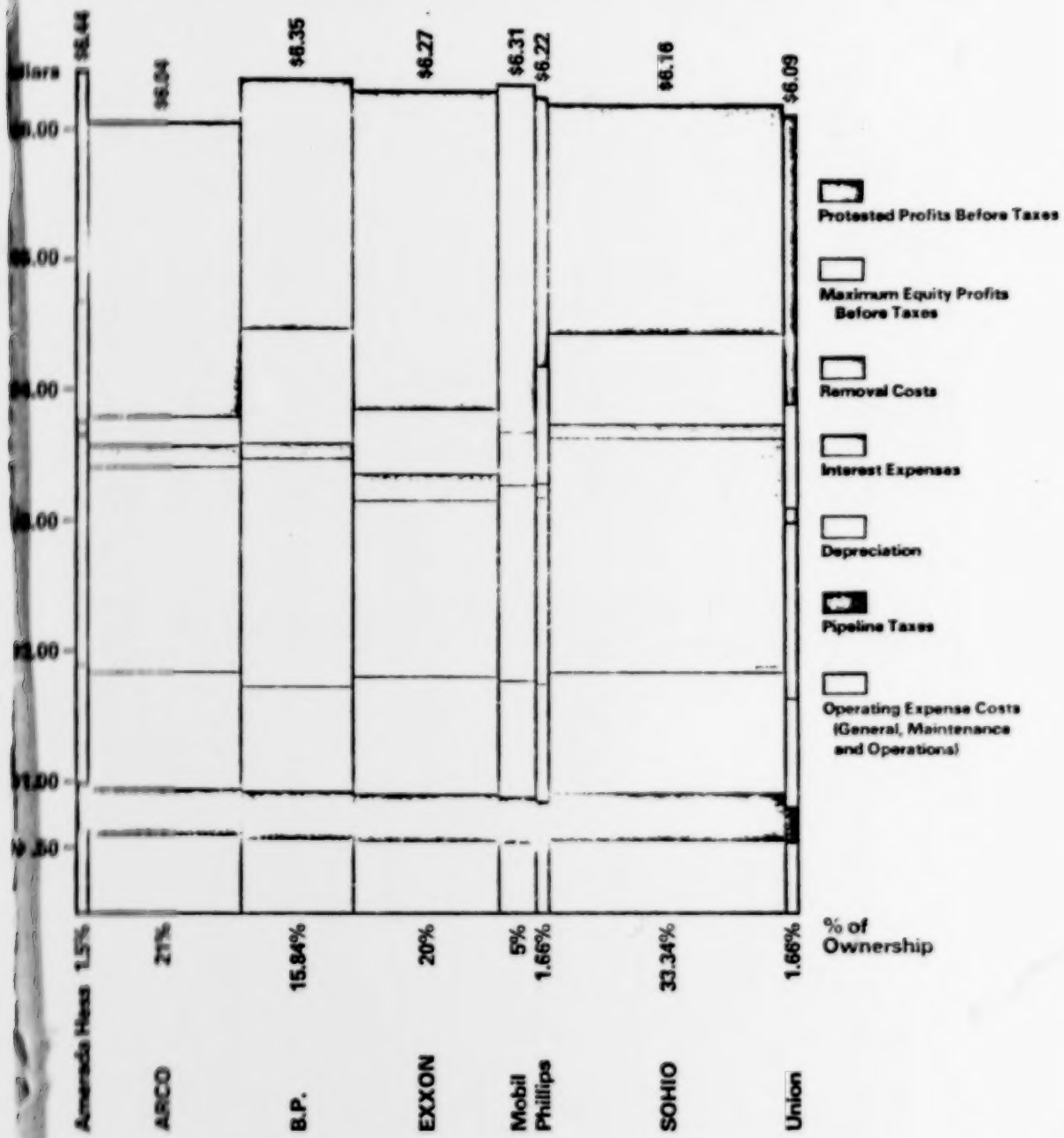
NOTE: Columns may not add due to rounding.

State of Alaska Oral Argument Exhibits, June 27, 1977

[Caption deleted]

PROTESTED TAPS RATES

A Breakdown Analysis of Costs and Profits Per Barrel



PER-BARREL EXPENSES OF TAPS CARRIERS BY SPECIFIC ACCOUNT
(CENTS PER BARREL)

		Alyeska (100%)	Amerada Hess (1.5%)	Arco PL (21%)	BP Pipelines (15.84%)	Exxon PL (20%)
	OPERATIONS					
300	Salaries and Wages	2.10	2.10	2.10	2.10	2.10
310	Supplies and Expenses	1.35	1.35	1.35	1.35	1.35
320	Outside Services	1.24	1.25	1.25	1.24	1.24
330	Operating Fuel and Power	6.51	9.02	14.77	9.02	11.64
340	Oil Losses and Shortages	-	-	-	-	-
	Total Operations	11.20	13.72	19.47	13.71	16.33
	MAINTENANCE					
400	Salaries and Wages	1.51	1.52	1.51	1.51	1.51
410	Supplies and Expenses	.89	.89	.93	1.05	.89
420	Outside Services	17.67	17.67	17.67	17.67	17.67
430	Maintenance Materials	1.97	1.97	1.97	1.81	1.97
	Total Maintenance	22.04	22.05	22.08	22.04	22.04
	GENERAL					
500	Salaries and Wages	4.08	4.07	4.08	5.09	4.53
510	Supplies and Expenses	1.50	1.53	1.54	2.37	1.55
520	Outside Services	5.54	12.90	5.54	6.62	5.70
530	Rentals	1.67	1.67	1.67	1.78	1.70
540	Depreciation and Amortization	-	85.73	83.93	74.95	84.13
550	Pensions and Benefits	1.40	1.40	1.40	1.63	1.53
560	Insurance	.91	1.64	.91	1.88	.91
570	Casualty and Other Losses	-	-	-	.14	-
580	Pipeline Taxes	.52	37.76	37.23	37.95	36.93
	Total General,	15.62	146.70	136.30	132.41	136.97
	(Outside Service Accts. 320,420, 520)	24.45	31.82	24.46	25.53	24.61
	Sub Total: Operating Expenses	48.86	182.47	177.85	168.16	175.34
	OTHER					
650	Interest Expense	2.12	173.94	154.54	171.36	132.83
60	Provision for removal and restoration	-	9.57	14.35	9.57	18.72
	Total Other	2.12	183.51	168.89	180.93	151.55
	GRAND TOTAL	50.98	365.98	346.74	358.09	326.89

PER-BARREL EXPENSES OF TAPS CARRIERS BY SPECIFIC ACCOUNT
(CENTS PER BARREL)

		Mobil Alaska PL (5.%)	Phillips Pet. Co. (1.66%)	SOHIO PL (33.34%)	Union Alaska PL (1.66%)
	OPERATIONS				
300	Salaries and Wages	2.10	2.10	2.10	2.10
310	Supplies and Expenses	3.17	1.35	1.35	1.35
320	Outside Services	1.25	1.24	1.25	1.25
330	Operating Fuel and Power	5.89	6.51	7.19	9.18
340	Oil Losses and Shortages	-	-	-	-
	Total Operations	12.41	11.20	11.89	13.88
	MAINTENANCE				
400	Salaries and Wages	1.51	1.51	1.52	1.52
410	Supplies and Expenses	1.05	.89	.89	.89
420	Outside Services	17.67	17.67	17.68	17.68
430	Maintenance Materials	1.81	1.97	1.98	1.98
	Total Maintenance	22.04	22.04	22.06	22.06
	GENERAL				
500	Salaries and Wages	4.08	4.08	4.12	4.09
510	Supplies and Expenses	1.54	1.54	1.55	1.54
520	Outside Services	7.17	5.89	8.14	6.04
530	Rentals	1.67	1.67	3.34	1.67
540	Depreciation and Amortization	82.55	83.36	86.42	79.08
550	Pensions and Benefits	1.40	1.40	1.41	1.40
560	Insurance	1.82	.91	1.74	.91
570	Casualty and Other Losses	-	-	-	-
580	Pipeline Taxes	37.76	37.75	37.76	37.76
	Total General	137.79	136.60	144.48	132.51
	(Outside Services Accts. 320, 420, 520)	26.09	24.80		24.97
	Sub Total: Operating Expenses	172.24	169.84	178.4	168.45
	OTHER				
650	Interest Expense	149.19	141.37	175.03	132.29
660	Provision for removal and restoration	38.78	9.57	9.59	9.59
	Total Other	187.97	150.94	184.62	142.88
	GRAND TOTAL	360.21	320.78	363.06	310.33

State of Alaska Oral Argument Exhibits

Total TAPS Revenue Providing 8% Return on Valuation

	$Million	Cents Per Barrel (Assumes 438MMB/Y)
1. Operating Expenses:		
a. Other than Depreciation	$408.2	93.2
b. Depreciation (25 yrs.)	371.2	84.7
c. Total Operating Expense	779.4	177.9
2. Removal (25 yrs.)	42.0	9.6
3. 8% Return on Valuation	779.8	178.0
4. Imputed Income Taxes 1/	95.0	21.7
5. Total Revenue Need	1,696.2	387.2
6. Protested/Published Rates	2,715.6	620.0 (avg.)
7. Excess Above ICC Criteria	1,019.4	232.8

1/ Imputed Income Tax Calculation

8% Return After Taxes	779.8
Interest	695.1
After Tax Income	84.7
Imported Income Tax at .5	95.0

State of Alaska Oral Argument Exhibits

Depreciation Expense Changes Depending on Service Life

	Amount ($Millions)	Cents Per Barrel (Assumes 438MMB/Y)
Original Cost	9,280	-
Depreciation Annual Charges/ Recovery: Based on Service Life of		
25 years 1/	371.2	84.7
27.5 years 2/	337.4	77.0
35 years 3/	265.1	60.5

1/ 25 year life urged by TAPS carriers.
2/ 27.5 year life assumed by ICC-BI&E.
3/ 35 year life urged by Alaska as consistent with presently outstanding depreciation Orders Numbered P-187-A (Arco PL); P-148-C (Exxon PL); P-3-E (Mobil PL); P-60-D (Phillips); and P-49-G (Sohio PL). The depreciation rates and related lives for reporting TAPS carriers shown in their Annual Reports are as follows:

Depreciation Rates and Related Life For TAPS Carriers

Pipeline	Average Depreciation Rate	Related Life
Arco Pipe Line Co.	2.34%	42.74 yrs.
Exxon Pipeline Co.	3.36%	29.76 yrs
Mobil Pipeline Co.	2.88%	34.72 yrs.
Sohio Pipe Line Co.	2.73%	36.63 yrs.

THE I.C.C. VALUATION FORMULA

The formula weights the original cost and the cost of reproduction new by their respective percentages of their combined total, multiples that total by the "condition percent", and then increases the result by 6% before adding the present value of land, rights of way and working capital. In a period of inflation, ever increasing weight is given to the inflated cost of reproduction new.

Under the Commission's "valuation" *formula* every dollar of original cost made thirty years ago (i.e. 1947) in a pipeline with a guide-life of 35 years (i.e. expected to last until 1982) would have a "valuation" in 1975 (exclusive of land, rights-of-way, and working capital) of *$1.07.*

A = $1.00
B = $3.43 (1975 Index = 343)
Cp = .35

$$J = \frac{A^2+B^2}{A+B} = \frac{\$1 + \$11.7649}{\$1 + \$3.43} = \frac{\$12.7649}{\$4.43} = \$2.8814672$$

X 1.06

$3,0543442

X .35

$1.0690243

The investment of $1 twenty-eight years ago would be given a value of $1.07 for the purposes of calculating a return and a permissible dividend payment even though the investor would have received a return of capital through depreciation charges to expenses amounting to 80 cents for each dollar invested. At the end of twenty-eight years in 1975 the investor would only have 20 cents of each original dollar still invested. Yet the Commission's "valuation" would give the pipeline investor a return based on a formula valuation of $1.07.

An eight (8%) or ten (10%) percent return on each such $1.07 of "valuation" would give the investor, the pipeline, a return of 8.56 cents or 10.7 cents, respectively. These represent an *actual return of 42.8% or 53.5%* on the 20 cents actually still invested according to the books of the company.

Where there is a six percent inflation rate the contrast between the I.CC. "valuation" and the net investment rate base (with no values added for land, rights of way and working capital) is as shown on the graph on the following page.

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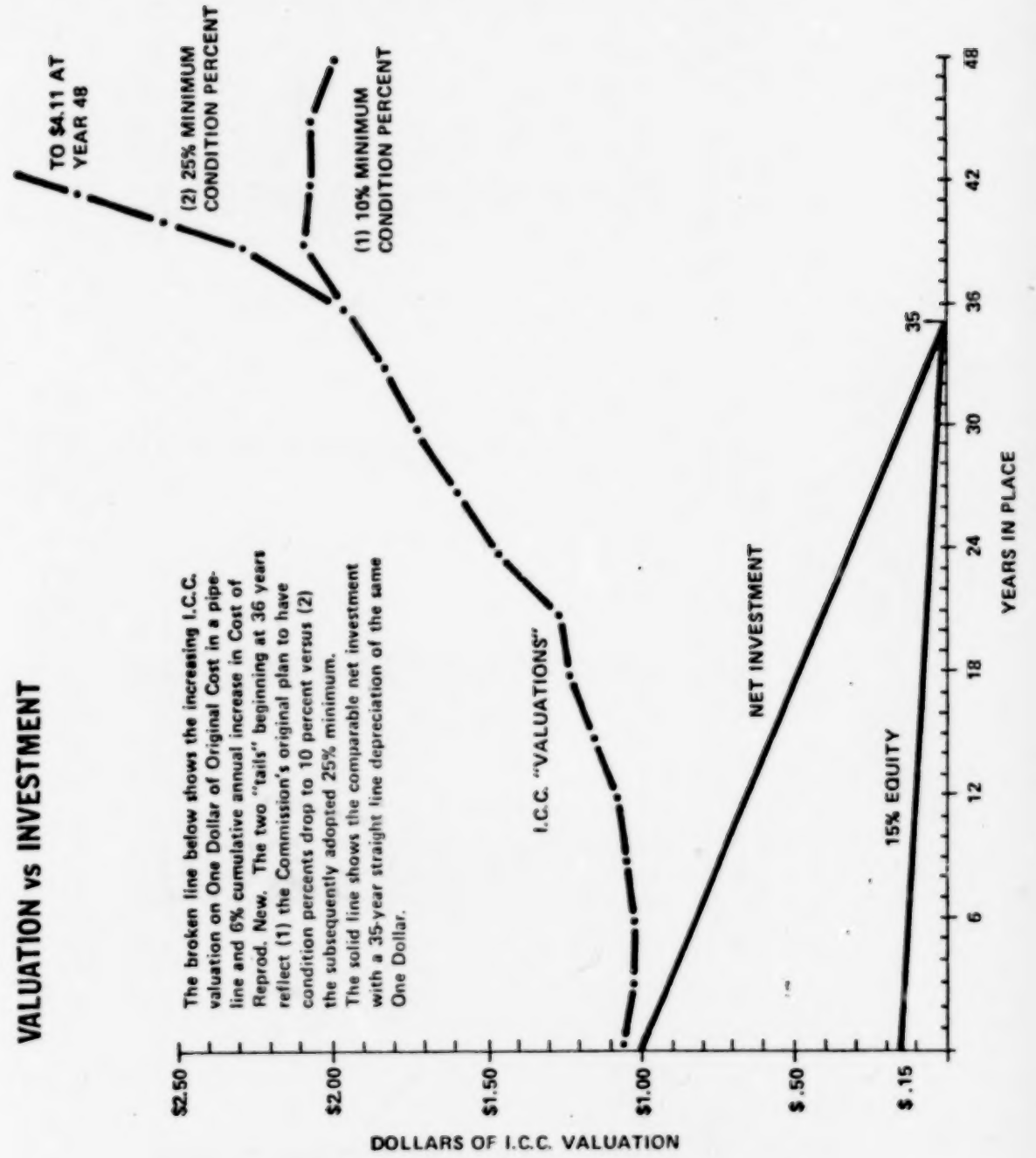

Estimated Pipeline "Valuation" And Return Based On I.C.C. Methodology And Criteria For Each Dollar Of Original Cost

(Inflation Rate of 6% Per Year)

I. 35 Year Life

Year	Cost of Reproduction New 2/ ($)	Condition Percent 3/	Weight of Original Cost 4/	"Valuation" 5/ ($)	8% Return on "Valuation" 6/ ($)
0 1/	1.000	1.00	.50	1.000	.085
1	1.060	.96	.49	1.049	.084
2	1.124	.92	.47	1.039	.083
3	1.191	.88	.46	1.030	.082
4	1.262	.85	.44	1.033	.083
5	1.338	.81	.43	1.025	.082
6	1.419	.78	.41	1.030	.082
7	1.504	.75	.40	1.035	.083
8	1.594	.71	.39	1.027	.082
9	1.689	.69	.37	1.048	.084
10	1.791	.66	.36	1.055	.084
11	1.898	.64	.35	1.078	.086
12	2.012	.61	.33	1.084	.087
13	2.133	.59	.32	1.108	.089
14	2.261	.57	.31	1.132	.091
15	2.397	.55	.29	1.157	.093
16	2.540	.53	.28	1.183	.095
17	2.693	.51	.27	1.208	.097
18	2.854	.49	.26	1.233	.099
19	3.026	.47	.25	1.257	.101
20	3.207	.46	.24	1.308	.105
21	3.400	.44	.23	1.331	.106
22	3.604	.43	.22	1.385	.111

State of Alaska Oral Argument Exhibit

Year	Cost of Reproduction New 2/ ($)	Condition Percent 3/	Weight of Original Cost 4/	"Valuation" 5/ ($)	8% Return on "Valuation" 6/ ($)
23	3.820	.41	.21	1.406	.112
24	4.049	.40	.20	1.461	.117
25	4.292	.39	.19	1.517	.121
26	4.549	.37	.18	1.533	.123
27	4.822	.36	.17	1.590	.127
28	5.112	.35	.16	1.647	.132
29	5.416	.33	.16	1.655	.132
30	5.743	.32	.15	1.710	.137
31	6.086	.31	.14	1.765	.141
32	6.453	.29	.13	1.759	.141
33	6.841	.28	.13	1.809	.145
34	7.251	.27	.12	1.858	.149
35	7.686	.26	.12	1.906	.152
36	8.147	.25	.11	1.952	.156
--					
40	10.286	.21	.09	2.106	.169
--					
50	18.420	.10	.105	1.857	.149

1/ For year zero, the original cost and the cost of reproduction new are the same.

2/ Original cost estimated at one dollar increased at an annual inflation rate of six (6%) percent as estimated cost of reproduction new.

3/ Condition percent is the ratio (%) of the cost of reproduction new less depreciation to the cost of reproduction new. For the purposes of this estimate the condition percent shown for pipe and fittings with a guide life of 35 years was used as shown in the January 1959 ICC publication entitled "Pipeline Condition Percent Table for Additions and Betterments." (Ex 33A, p.3)

4/ Weight given the original cost under the I.C.C. estimated formula.

5/ Valuation:

$$V = \left[A\left(\frac{A}{A+B}\right) + B\left(\frac{B}{A+B}\right)\right] Cp. \times 1.06$$

or $$V = \left(\frac{A^2+B^2}{A+B}\right) Cp. \times 1.06$$ (no value added for land, right of way or working capital)

Nos. 77-452, 77-457, and 77-5

Supreme Court, U. S.
FILED
NOV 4 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

MOBIL ALASKA PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

EXXON PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

BP PIPELINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL PARTIES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-452

MOBIL ALASKA PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 77-457

EXXON PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 77-551

BP PIPELINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL PARTIES IN OPPOSITION

At issue in this case is the validity of an order of the Interstate Commerce Commission that (1) suspended for seven months the operation of tariffs filed by petitioners stating new rates for the transportation of crude oil through the Trans Alaska Pipeline System, (2) instituted an investigation into the lawfulness of the rates contained in the suspended tariffs, and (3) authorized petitioners to file tariffs stating reduced interim rates for the suspension period.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission had authority under Section 15(7) of the Interstate Commerce Act to suspend for seven months the operation of an initial schedule stating a new rate for the interstate transportation of crude oil by pipeline.

2. Whether the Commission had authority to allow interim rates for such transportation to go into effect during the suspension period and to announce in advance the maximum interim rate level it would be willing to accept without suspension.

3. Whether the Commission had authority to condition its acceptance of a carrier's interim rate filing without suspension on the carrier's agreement to refund the portion of any charges it collects in excess ~~to~~ of what may later be found, after a full hearing pursuant to Section 15(1) of the Act, to be the just and reasonable rate level.

STATEMENT

1. The background of this case was succinctly stated by the court of appeals (Pet. App. A-3 to A-5; footnotes omitted):[1]

> This controversy arose on the eve of the flow of crude oil through the Trans Alaska Pipeline System (TAPS) which stretches from oil fields in Alaska's North Slope at Prudhoe Bay to Valdez, Alaska, some 800 miles distant. The pipeline was constructed by the Alyeska Pipeline Service Corporation, an agent for its eight owners.[2]

[1]Except where otherwise noted, "Pet. App." refers to the appendix to the petition in No. 77-452.

[2]Petitioners Mobil Alaska Pipeline Company, Exxon Pipeline Company, and BP Pipelines, Inc., respectively own 5 percent, 20 percent, and 15.84 percent of the pipeline system (Pet. App. A-3 to A-4, n. 3). Petitioners are affiliates or subsidiaries of corporations engaged in the production of oil in the north Alaskan fields; petitioner Mobil Alaska Pipeline Company, for example, is a subsidiary of Mobil Oil Corporation, which owns 2 percent of the oil being produced in those fields (No. 77-452, Pet. 5 and n. 3).

> Between May 27, 1977 and June 15, 1977, seven TAPS owners [including petitioners] filed * * * [initial rate] tariffs [for the carriage of crude petroleum over the pipeline system] * * *. Protests [and petitions for suspension of the tariffs] were filed by the Department of Justice, the State of Alaska, the Arctic Slope Regional Corporation, and the * * * Bureau of Investigation and Enforcement [of the Interstate Commerce Commission]. The Commission heard oral argument on June 27, 1977 without making any formal evidentiary record.

2. On the day after the hearing, the Commission entered an order instituting an investigation of the lawfulness of the proposed rates pursuant to Section 15(1) and (7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(1) and (7), and suspending the rates pending the investigation for the statutory period of seven months pursuant to Section 15(7), without prejudice to the filing of interim rates during the suspension period (Pet. App. C-1 to C-27).

The Commission explained its decision to institute an investigation as follows (Pet. App. C-2 to C-4):

> In order for a rate to be lawful, a primary requirement is that it be just and reasonable * * *. * * *
>
> Protestants contend that the filed rates would provide excessive profits, whether compared with a traditional rate of return on valuation or with the carriers' capital costs. * * *
>
> * * * * *

> * * * [W]hile there may be merit to the carriers' contentions that the standards used by protestants do not cover their true costs of capital, this is a matter that cannot be resolved until a more complete record is developed. Finally, evidentiary hearings will be necessary to develop acceptable cost data for use in applying whatever measures of reasonableness are found to be appropriate. * * *

The Commission determined that its power to suspend "any schedule stating a new individual or joint rate, fare, or charge" (Section 15(7) of the Act) extended to initial rates such as those before it (Pet. App. C-4 to C-5). The Commission noted that "the maintenance of excessively high rates could act as an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the [native] Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil" (Pet. App. C-5), and it concluded that in these circumstances, especially in view of the protestants' showing of the probable unlawfulness of the rates, suspension was preferable to the alternative of a later refund of excessive charges (*ibid.*).

However, in order to permit the pipeline owners to commence operation of the pipeline prior to the expiration of the seven-month suspension period, which they could not do otherwise (Section 6(7) of the Act, 49 U.S.C. 6(7)), the Commission authorized them to file lower interim rate tariffs and, basing its determination on the cost data supplied by the pipeline owners themselves, indicated the maximum interim rates that it would accept without suspension (Pet. App. C-5 to C-16).

3. Petitioners and other affected pipeline owners filed petitions for review in the United States Court of Appeals for the Fifth Circuit, seeking injunctive relief against the

suspension of their initial rate tariffs. The court of appeals, with one judge dissenting, dismissed the petitions (Pet. App. A-1 to A-25). The court determined, on the basis of the language of Section 15(7), the legislative policy underlying the statute, and a comparison of that statute with other statutes conferring authority to suspend rates, that the Commission had power to suspend initial rate tariffs (Pet. App. A-10 to A-12). The court further concluded that the Commission "as [a] corollary to its suspension power had the power to set out allowable rate ceilings for the seven-month period which, if filed, it would not suspend" (Pet. App. A-15). Accordingly, the court denied "[a]ll motions for stay, suspension, injunction and other forms of interlocutory relief" (Pet. App. A-16) and dismissed the petitions.

4. Each petitioner thereafter filed interim rate tariffs with the Commission and commenced pipeline operations (No. 77-452, Pet. 11-12; No. 77-457, Appl. 4; No. 77-551, Pet. 6).

5. On October 20, 1977, this Court stayed the Commission's suspension order pending final disposition of the petitions for a writ of certiorari. The stay was conditioned upon petitioners' agreement to keep account of charges collected during the pendency of the stay and to refund any portion of such charges that they are ultimately found to have not been entitled to collect.

ARGUMENT

1. Petitioners Mobil Alaska and BP, but not petitioner Exxon, contend that the Commission has no authority under Section 15(7) of the Act to suspend the operation of initial, as opposed to changed, rate schedules. This contention was correctly rejected by the Commission and the court of appeals and does not warrant review by this Court.

Section 15(7) provides that "[w]henever there shall be filed with the Commission *any* schedule stating a *new* * * * *rate, fare, or charge*, * * * the Commission * * * may from time to time suspend the operation of such schedule and defer the use of such rate, fare, [or] charge, * * * but not for a longer period than seven months beyond the time when it would otherwise go into effect" (emphasis added). The Commission itself has long interpreted the phrase "new rate" in Section 15(7) as comprehending "both changed and initial" rates. *Rail-Water, Grain in Bulk, Mo., Ill., and Ind. to Buffalo*, 321 I.C.C. 564, 566. As this Court often has had occasion to state, "great deference [is due] to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16.

The Commission's interpretation, moreover, is fully supported by comparison of Section 15(7) with other provisions of the statute. The court of appeals correctly stated (Pet. App. A-11 to A-12):

> Section 15(7) has served as the prototype of other agency rate suspension provisions in the Interstate Commerce Act and in other regulatory acts as well. In many of these acts, when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language. In the Interstate Commerce Act itself, there are provisions modeled on 49 U.S.C.A. §15(7) giving the ICC authority to suspend new rates, proposed by motor carriers, 49 U.S.C.A. §316(g), by water carriers, 49 U.S.C.A. §907(g)(i), and by freight forwarders, 49 U.S.C.A. §1006(e). Each of these provisions contains a grandfather clause exempting certain initial rates from suspension. If initial rates were not covered there would have been no need for the grandfather clauses. Another example is 49 U.S.C.A. §1482(g),

> which gives the Civil Aeronautics Board suspension powers similar to those granted to the ICC with one significant difference: it specifically provides that "[t]his subsection shall not apply to any initial tariff filed by any air carrier." Thus, we conclude that if Congress had wished to exempt initial tariffs from the purview of §15(7) it would have done so specifically, and that Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's §15(7) suspension powers.

This reading of the statute also is supported by consideration of the legislative policy underlying the statutory scheme. Were the Commission powerless to suspend an initial rate filing, as petitioners contend, a carrier serving a new market would be free to set and collect even outrageously excessive rates without interference from the Commission until after a potentially lengthy investigatory proceeding. Section 15(7) was designed to protect the public *during* the investigatory proceeding from the dangers of probably unlawful carrier-imposed rates. There is no basis for imputing to Congress an intention to strip the public of that protection with respect to initial rates, where the need may be greatest. On the contrary, Section 1(5) of the Act, 49 U.S.C. 1(5), provides that "[*a*]*ll* charges * * * shall be just and reasonable, and *every* unjust and unreasonable charge * * * is prohibited and declared to be unlawful" (emphasis added). That overriding congressional policy weighs heavily against the novel statutory interpretation that petitioners advance. The court of appeals correctly summarized (Pet. App. A-12):

> Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need

for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.[1]

Finally, in view of the fact that this case apparently represents the first time in the long history of the Interstate Commerce Act that the Commission's power to suspend initial rates under Section 15(7) has been challenged, the issue can hardly be said to be a recurring

[1]Petitioners' reliance on the Federal Power Commission's interpretation of the analogous provisions of the Federal Power Act and Natural Gas Act also is misplaced. Although the suspension authority conferred by those statutes is similar to that conferred by Section 15(7) of the Interstate Commerce Act, the differences are critical. Section 15(7) gives the Interstate Commerce Commission authority to suspend the operation of "*any* schedule stating a new * * * rate" (emphasis added). By contrast, Section 205(e) of the Federal Power Act, as added, 49 Stat. 852, 16 U.S.C. 824d(e), and Section 4(e) of the Natural Gas Act, 52 Stat. 823, as amended, 15 U.S.C. 717c(e), gave the Federal Power Commission authority to suspend "any such new schedule." The phrase "such new schedule" in each of the latter provisions refers to an immediately preceding subsection, which provides that no change may be made in any rate except upon 30 days' notice, to "be given by filing * * * *new schedules* stating plainly the change or changes to be made in the schedule or schedules then in force" (emphasis added). Section 205(d), 16 U.S.C. 824d(d); Section 4(d), 15 U.S.C. 717c(d).

The fact that the text of the Federal Power Act and the Natural Gas Act support the Federal Power Commission's interpretation of those statutes does not detract in any way from the deference owed to the Interstate Commerce Commission's interpretation of different language in a different statute. The Interstate Commerce Act contains no provision giving to the phrase "any schedule stating a new * * * rate" (49 U.S.C. 15(7)) a meaning equivalent to that given by the Federal Power and Natural Gas Acts to the phrase "new schedule." Cf. 49 U.S.C. 6(3). As this Court noted in *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 353, "[t]ranslation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

matter of substantial importance warranting review on certiorari. In this connection, it should be noted that as of October 1, 1977, jurisdiction under the Interstate Commerce Act over the transportation of oil by pipeline has been transferred from the Interstate Commerce Commission to the Federal Energy Regulatory Commission. See Section 306 of the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 581; Executive Order 12009, 42 Fed. Reg. 46267.

2. If, as we have argued, the Commission's suspension of petitioners' initial rate tariffs was lawful, petitioners were barred from commencing operations as common carriers during the seven-month suspension period unless and until they filed new rate tariffs. See Section 6(7) of the Act. After the court of appeals dismissed their suits for review of the suspension order, petitioners filed interim rate tariffs, which the Commission permitted to go into effect, and petitioners began operating the pipeline.

Petitioners apparently do not contend that the Commission has no power to permit interim rates to go into effect.[4] Petitioners argue, however, that it was improper

[4]Indeed, petitioners would have no standing to make such a contention. They were not harmed by the Commission's acceptance of their interim tariffs. To the contrary, petitioners' decisions to file such tariffs reflected their individual determinations that it would be more profitable to operate at lower interim rates than not to operate during the suspension period at all. Petitioners could not be heard to challenge the lawfulness of agency action of which they are the beneficiaries.

In any event, the Commission correctly explained its power to accept interim rates (Pet. App. C-6 to C-7):

> We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier

for the Commission to have announced, in its suspension order, the maximum interim rates it would be willing to accept without suspension.

Petitioners' contention is answered by this Court's decision in *United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500. In that case, as here, the Commission had suspended one set of rate tariffs but had authorized the filing of another, somewhat less favorable to the carriers, that would become effective without prior investigation and hearing. See 426 U.S. at 503-504. This Court firmly sustained that practice as "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation." 426 U.S. at 514. That determination governs this case as well. The Commission's decision to authorize interim rates here, like its authorization in *Chesapeake & Ohio* of new railroad tariffs with conditions specifying the manner in which additional revenues would be expended, represented a "measured course * * * offer[ing] an alternative tailored far more precisely to the particular circumstances presented." *Ibid.* See also *In re North American Light & Power Co.*, 170 F. 2d 924, 930-931 (C.A. 3).

This Court's decision in *Chesapeake & Ohio* also disposes of petitioners' contention that the Commission's indication of the maximum interim rates it would accept constituted an improper prescription of rates without a prior hearing. Petitioners confuse the prescription of rates, which is the final approval of rates as lawful after a hearing held pursuant to Section 15(1) of the Act, with

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operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest.

the acceptance of a rate tariff, without a prior hearing but subject to a subsequent determination of lawfulness. The Commission's acceptance of petitioners' interim rate tariffs plainly was not a determination of the lawfulness of the rates set forth in those tariffs. To the contrary, the lawfulness of petitioners' rates will only be determined after investigation and hearing. The acceptance of rate tariffs pending a subsequent determination of lawfulness need not itself be preceded by a hearing. See Sections 6(1) and 15(7) of the Act. The fact that the tariffs accepted by the Commission were not of petitioners' first choosing does not alter the matter; as in *Chesapeake & Ohio*, the Commission had authority to suspend one tariff and accept another without a prior hearing, subject to the protections offered by a subsequent hearing on the question of the lawfulness of the carriers' rates.

The Commission's announcement of the maximum interim rates it would be willing to accept without suspension not only was legitimate and reasonable, but also served the convenience both of petitioners and the other affected pipeline owners and of the general public. In the absence of such an announcement, petitioners still would have been required to file interim rate tariffs in order to commence operations, but they would not have known what level of interim rates would be acceptable. Petitioners would have been forced to file consecutive interim rate tariffs, each being subject to suspension by the Commission, until they reached an acceptable figure (which might actually be lower than the maximum the Commission would have been willing to accept). Meanwhile, the pipeline would have lain idle, with the consequence that all revenues would have been denied to petitioners and critically needed energy supplies to the nation. There is no logic to such a result; the statute does not require, nor could Congress have intended, so

ponderous a procedure. The Commission properly obviated the necessity of such a procedure by indicating in advance the interim rates it was willing to permit.

Petitioners contend that the decision below conflicts with *Moss* v. *Civil Aeronautics Board*, 430 F. 2d 891 (C.A.D.C.). But since the cases arose under separate and different regulatory schemes, there can be no conflict in the strict sense. Moreover, insofar as the decision in *Moss* purports to place general limitations on a regulatory agency's ability to use its suspension power to induce the filing of a modified rate tariff, it must be viewed as having been overruled by this Court's subsequent decision in *Chesapeake & Ohio*. Accordingly, there is no reason to believe that the court that decided *Moss* would extend the reasoning of that case to the provisions of the Interstate Commerce Act involved here and in *Chesapeake & Ohio*.

In any event, the evil that concerned the court in *Moss* is not present here. In *Moss* the court suspected that a regulatory agency had connived, in *ex parte* meetings with members of the regulated industry, to implement a significant revision of the agency's overall practices with respect to the setting of permanent rates in a manner that would effectively insulate those rates from any judicial inquiry into their lawfulness. See 430 F. 2d at 893-894, 900-902. In contrast, in this case there is no suggestion that the interest of the public has been subordinated to that of the regulated industry as a result of *ex parte* dealings; only temporary rates have been authorized, and once permanent rates are fixed they will be subject to unhindered judicial review. These facts would not invoke the *Moss* doctrine, which serves only to "extend[] judicial power where an agency is using the suspension authority so as to avoid or limit the judicial review provided by Congress * * *." *Continental Air Lines, Inc.* v. *Civil Aeronautics Board*, 522 F. 2d 107, 131 (C.A.D.C.) (Leventhal, J., concurring).

3. The Commission recognized that "even the lower interim rate levels may prove upon investigation to exceed reasonable levels" (No. 77-457, Pet. App. 30a). It therefore conditioned its willingness to accept the filing of interim rate schedules without suspension on a "require[ment] that the carriers keep account of the amounts collected under the interim rates or the proposed rates should they become effective[5] and that they agree to refund any portion of such amounts that may ultimately be established as excessive" (*ibid.*).

Petitioners argue that the imposition of such a refund condition exceeds the Commission's power because the statute does not authorize the Commission to enter refund orders with respect to initial rates. The court of appeals, relying on this Court's decision in *Chesapeake & Ohio*, correctly rejected this contention (Pet. App. A-16):

> With respect to this exercise of power for the seven-month period, like the power to suggest the interim rates themselves, we find this is a valid corollary to the suspension power, which we lack jurisdiction to review. * * * We are less certain of the Commission's power to require the carriers to establish refund provisions with respect to the originally filed rates. However, we view this exercise of power as corollary to the power to suspend. Thus, insofar as the Commission's order reaches beyond the seven-month period, we are guided by *Chessie*, where the condition upheld by the Supreme Court was permanent.

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[5]As the court of appeals noted, "if the Commission does not complete its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect" (Pet. App. A-15 to A-16, n. 15).

The Commission did not assert the power to impose a condition unrelated to the purpose of a suspension order. On the contrary, refund conditions, like suspension itself, are designed to protect the public from the injury that results when a carrier charges unreasonably high rates. The refund condition imposed by the Commission here, no less than the condition upheld by this Court in *Chesapeake & Ohio*, which specified the manner in which certain revenues must be expended, is a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation" (426 U.S. at 514).

Moreover, a self-executing refund requirement is particularly appropriate in the circumstances of this case, where the shippers are in large part affiliated with the carriers and where the persons directly affected by unreasonably high rates include the holders of royalty interests.[6] In the absence of a refund requirement, the carrier-affiliated shippers might have little incentive to initiate separate reparations actions against the carriers with which they are affiliated, since the effect of reparations payments would be to divert revenues from the affiliated companies to holders of royalty interests. The Commission's refund condition was thus "tailored * * * precisely to the particular circumstances presented." *United States* v. *Chesapeake & Ohio R. Co., supra*, 426 U.S. at 514.

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[6]"Since the price of oil, as delivered at refineries in the lower 48 states, is fixed in relation to world oil prices, the value at the wellhead is in inverse relation to the cost of pipeline transport" (No. 77-452, Pet. 7, n. 5). Consequently, if the transportation rates are excessive, the wellhead price is reduced and those who have royalty interests in that price suffer diminished revenues. Both the State of Alaska and the Arctic Slope Regional Corporation (which represents Alaskan natives) have royalty interests in the wellhead value of North Slope oil.

4. If, as we submit, the Commission was empowered to suspend petitioners' initial rate tariffs, to announce the maximum interim rates it would accept without suspension, and to impose a refund condition on its acceptance of such interim rates without suspension, that is the end of the matter. The courts have no jurisdiction to review the correctness of the Commission's determination that rates in excess of the interim rates allowed would have been probably unlawful. Suspension orders under Section 15(7) are not reviewable: Congress intended to "vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief." *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 667. See also *United States* v. *SCRAP*, 412 U.S. 669, 690-698.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

DOJ-1977-11

Nos. 77-451, 77-457, 77-551, 77-602

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, *ET AL.*,
Respondents.

EXXON PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Respondents.

BP PIPELINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Respondents.

ARCO PIPE LINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DEPARTMENT OF ENERGY AND FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS, THE STATE OF ALASKA AND ARCTIC SLOPE REGIONAL CORPORATION

November 4, 1977

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IN THE

Supreme Court of the United States

October Term, 1977

Nos. 77-451, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,
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ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS, THE STATE OF ALASKA AND ARCTIC SLOPE REGIONAL CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit in the consolidated proceedings styled *Mobil Alaska*

Pipeline Co. v. United States and Interstate Commerce Commission is reported at 557 F.2d 775 (1977). That decision dismissed petitions seeking judicial review of a June 28, 1977 Order of the Interstate Commerce Commission (ICC) in Investigation and Suspension Docket No. 9164 (Rate Filings) and No. 36611 (Rules and Regulations).[1]

JURISDICTION

The jurisdictional requisites are set forth in the various petitions.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission has the statutory power and authority under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. §15(7), to suspend the initial rates proposed by the carriers for the transportation of crude oil through the Trans Alaska Pipeline System

[1]On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977), and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the functions and regulatory responsibilities of the Interstate Commerce Commission with respect to the establishment of rates and valuations of oil pipelines were transferred to the Federal Energy Regulatory Commission (FERC), which, as an independent Commission within the Department of Energy, was activated on October 1, 1977. The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending on the date the DOE Act takes effect before any department, agency, commission or component thereof, the functions of which are transferred by the DOE Act, shall not be affected, and that orders shall be issued in such proceedings as if the DOE Act had not been enacted.

(TAPS) upon a finding of probable unlawfulness of the proposed rates.

2. Whether the ICC's Order, insofar as it authorizes the carriers to file new rates not exceeding specified amounts calculated under a known standard of reasonableness, a standard modified for the benefit of petitioners, constitutes a prescription or fixing of rates.

3. Whether the ICC can impose a refund condition in connection with both the originally filed tariffs placed under suspension and the interim rates authorized to be put into effect during the suspension period.

STATEMENT OF THE CASE

The facts of the case are set forth in the opinion of the Court of Appeals.[2]

ARGUMENT

The petitions for certiorari are based on an erroneous premise, namely, that the ICC prescribed or fixed, and the Court of Appeals upheld, "interim rates" for the pipeline carriers. The Commission did nothing of the sort. What it did do was to suspend, for a period of seven months, the rates filed by the carriers upon a showing by the protestants that those rates were probably unlawful. (App. C-4). The Commission's action was clearly within its statutory power and is supported by the plain language of Section 15(7), prior Commission decisions interpreting that section, and a comparison with other suspension clauses in the Interstate

[2]The opinion appears at Appendix A. Appendix references (hereinafter "App.") will be to the appendices to the Petition for Writ of Certiorari of Mobil Alaska Pipeline Company in No. 77-451, dated September 21, 1977.

Commerce Act as well as other statutes. It was an action which, as this Court has held in many cases, Congress intended to be exempt from judicial review.

To be sure, the ICC took the further step of indicating, for the guidance of the carriers, the parameters of interim rates which, if filed by the carriers, the Commission would not suspend. Absent such guidance, the carriers might have repeatedly filed tariffs which the Commission would have been required to repeatedly suspend until a rate level acceptable in the public interest was reached. That the Commission accompanied its suspension order with a clear and considered indication of an acceptable rate level did not change the essential nature of its action. It did not, as petitioners contend, thereby transform a *suspension* order into a *rate-fixing* order. Had the Commission merely suspended the tariffs originally filed, petitioners would concededly be out of court. It would be paradoxical, and would wholly frustrate the statutory allocation of responsibilities between the Commission and the courts, to hold that the guidance given the carriers by the Commission changed the character of the agency action here.

The Fifth Circuit carefully reviewed the decision of the Commission and agreed that the Commission does have the power to suspend initial rates and that its exercise of the suspension power did not result in a prescription of rates. There is no basis for concluding, as petitioners did, that the Fifth Circuit decision is in conflict with the decision of the District of Columbia Circuit in *Moss v. CAB*, 430 F.2d 891 (1970).

The decision below was in accord with the principles of judicial review of ICC suspension orders which have been reiterated in numerous decisions of this Court. Accordingly, for the reasons detailed below, further review is not warranted.

I. CONGRESS HAS GRANTED THE COMMISSION POWER TO SUSPEND INITIAL TARIFF RATES.

In suspending the initially proposed rates of the TAPS carriers, the ICC clearly acted within its statutory authority. The opinion of the Commission carefully discussed the question of its power to suspend initial rates and concluded that the plain language of Section 15(7) of the Act authorizes the action taken. (App. C-4, 5). As the Commission stated, Section 15(7) authorizes it to initiate a hearing concerning "any schedule stating a new individual or joint rate, fare, or charge," and, pending the hearing, to suspend the schedule for up to seven months. By suspending the initially filed TAPS rates for seven months, the Commission did precisely what Section 15(7) authorizes.

The term "new individual or joint rate" is unambiguous. A rate which has never been in effect is, literally, a new rate. Any possible doubt on this score has been removed by the Commission in its decisions. *Barge-Rail Coal From Huntington, West Virginia to Chicago District*, 315 I.C.C. 129 (1961) *aff'd per curiam sub nom., Chicago, Eastern Illinois R.R. v. United States*, 375 U.S. 150 (1963); *Bituminous Coal Via Motor-Rail From Lynnville, Indiana to Chicago, Illinois*, 313 I.C.C. 573 (1961); *Cotton from New Orleans*, 49 I.C.C. 751 (1918).

In *Rail-Water, Grain in Bulk, Mo., Ill., and Ind., to Buffalo*, 321 I.C.C. 504 (1963), the Commission expressly stated that "initial" as well as "changed" rates were "new" rates within the meaning of Section 15(7):

> Of particular significance are the *express terms* found in sections 15(7) and 307(g). Each provide for suspension and/or investigation of "*** a new rate ***." [sic] *which encompasses both changed and initial.* However, each section places the burden of proof upon the proponent of only a 'changed' rate. 321 I.C.C. at 566 (emphasis added).

That long-standing administrative interpretation of the agency's authority has neither been rejected nor altered by Congress or this Court.[3] To construe Section 15(7) otherwise would create a huge gap in the regulatory scheme created by Congress because it would leave the Commission without any power to act on initial rates.

Evidence that Congress intended to make Section 15(7) applicable to initial rates can be found by comparing it with the suspension powers in other parts of the Interstate Commerce Act. Sections 216(g),[4] 218(c),[5] 307(g),[6] 307(i)[7] and 406(e)[8] contain suspension provisions identical to Section 15(7), except that they also include "grandfather" language making the suspension provisions inapplicable to certain "initial" rates filed on or before specified dates. Section 15(7) contains no such grandfather clause. Thus, as the Fifth Circuit noted, "if Congress had wished to exempt initial tariffs from the purview of Section 15(7), it would have done so specifically." (App. A-12).

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[3]Petitioners argue here, as they did before the Fifth Circuit, that the legislative history of Section 15(7) indicates that Congress did not intend that the Commission have the power to suspend initial rates. The Fifth Circuit found that this was not the case, stating that:

> The statutory history of the Mann-Elkins Act (1910), which added §15(7) to the Interstate Commerce Act, yields little insight on whether the ICC is empowered to suspend initial rates and no one seems to have debated or even discussed this specific question. *However, our examination of statutes modeled on §15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates.* App. A-11 (emphasis added).

[4]49 U.S.C. §316(g).
[5]49 U.S.C. §318(c).
[6]49 U.S.C. §907(g).
[7]49 U.S.C. §907(i).
[8]49 U.S.C. §1006(e).

A comparison of the suspension sections in the Federal Communication Act[9] and the Civil Aeronautics Act[10] provides further evidence of an intent by Congress to grant the Interstate Commerce Commission power to suspend initial rates. The statutory language conferring the power of suspension upon these agencies by Congress is similar to Section 15(7) of the Interstate Commerce Act. In 1976 Congress amended the suspension section of the Federal Communication Act, making more explicit that the suspension power encompassed initial rates:

> Section 204 of the Act is in effect redesignated section 204(a) and is amended to extend from 3 to 5 months the period during which the Commission may suspend the operation of a tariff filing in whole or in part pending hearing on the lawfulness thereof. Other minor language changes in the subsection *clarify* that the provisions of the subsection are applicable to new as well as revised charges, classifications, regulations or practices. H.R. Rep. No. 1315, 94th Cong., 2d. Sess. 6 (1976) (emphasis added).

In contrast, Congress conferred upon the Civil Aeronautics Board a suspension power with an express proviso denying the Board the power to suspend initial rates. 49 U.S.C. §1482(g). Thus, it would appear to be Congress' understanding that, absent such an express proviso, the suspension power of 49 U.S.C. §1482, and Section 15(7) of the Interstate Commerce Act, would include the authority to suspend initial rates.

After examining various statutes modeled on Section 15(7), as well as the legislative policy underlying that section, the Court of Appeals rejected the carriers contention

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[9]47 U.S.C. §204(a).
[10]49 U.S.C. §1482(g).

that the Commission was powerless to suspend initial rates. (App. A-11).[11] It found that:

> Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. App. A-12.

The court's conclusion regarding the suspension power under Section 15(7), although obvious and important, is one that the petitioners have failed to address:

> The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme. App. A-12.[12]

II. A SUSPENSION ORDER OF THE INTERSTATE COMMERCE COMMISSION IS WITHIN THE SOLE DISCRETION OF THE COMMISSION

It is well settled that a decision of the Commission whether to suspend a proposed rate is committed solely to its discretion, and is a decision which is unreviewable by the courts. This Court has consistently held that Congress has withdrawn from the courts any jurisdiction to review, enjoin, or otherwise modify suspension Orders pursuant to

[11]Judge Roney in his dissent assumed without deciding that the Commission did have the power to suspend the initial rates. (App. A-19).

[12]Respondents emphasize that the suspension Order was issued *only after* an ICC finding that the proposed rates were probably unlawful:

> [W]e do not believe that the rates can be allowed to go into effect without suspension, when, as here, the protestants have made a showing or [sic] probable unlawfulness. App. C-4.

Section 15(7). *United States v. SCRAP*, 412 U.S. 669, 690-98 (1973) (*SCRAP* I); *Atchison, Topeka & Santa Fe v. Wichita Board of Trade*, 412 U.S. 800, 823 (1973); *Arrow Transportation Co., v. Southern Railway*, 372 U.S. 658, 62-68 (1963); *Board of Railroad Comm'rs v. Great Northern R. Co.*, 281 U.S. 412, 429 (1930).

In *Arrow* this Court, reviewing the ICC's suspension power, concluded:

> We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. This Court has previously indicated its view that the present section had that effect. In *Board of Railroad Comm'rs v. Great Northern R. Co.*, 281 U.S. 412, 429 Chief Justice Hughes said for the Court: 'This power of suspension was entrusted to the Commission only.' The lower federal courts have also said as much. And the commentators on the matter have consistently supported the soundness of that view. 372 U.S. at 667-68.

Later in *SCRAP I* the Court focused on the balancing of equities that led Congress to limit judicial intervention under Section 15(7):

> The suspension period was limited as to time to prevent excessive harm to the carriers, for the revenues lost during that period could not be recouped from the shippers. On the other hand, Congress was aware that if the Commission did not act within the suspension period, then the new rates would automatically go into effect and the shippers would have to pay increased rates that might eventually be found unlawful. To mitigate

> this loss, Congress authorized the Commission to require the carriers to keep detailed accounts and eventually to repay the increased rates if found unlawful. 412 U.S. at 697.

And, in *Atchison, Topeka & Santa Fe Railroad Company v. Wichita Board of Trade*, 412 U.S. 800 (1973), the Court stated:

> In giving the Interstate Commerce Commission power to suspend proposed rate increases, Congress allocated the benefit and harm of a suspension. 412 U.S. at 823.

Thus, as this Court has repeatedly held, the Congressional delegation of suspension power to the Commission is not subject to judicial review.

Congress clearly recognized that, for the limited suspension period, revenues might be lost to the carriers. However, by providing the Commission with the power to suspend, Congress balanced all interests and determined that a refund or reparation provision would not adequately protect the public interest in all cases. Here, the Commission determined that excessive rates would deprive the citizens of the State of Alaska, particularly the Arctic Slope natives, of funds presently required for public services such as education and medical treatment. Citizens deprived of such services will be irreparably injured since the retroactive funding of schools and medical services may well come too late for those most in need of the services. This is a particularly likely prospect in this case where the issues are complex and may take several years to finally resolve.

An additional factor supporting this conclusion is that judicial review would interfere with the primary jurisdiction of the Interstate Commerce Commission. In *Arrow* the Court stated:

> Our conclusion from the history of the suspension power is buttressed by a consideration of the undesirable consequences which would necessarily attend the survival of the injunction remedy. A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review. These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission, 372 U.S. 669-70 *See also SCRAP I*, 412 U.S. at 697 (citations omitted).

Acceptance of petitioners' arguments that an initial rate is not subject to a suspension order and, in any case, that the Commission cannot indicate any standard for refiling,[3] would result in a situation where every suspension order against a rate increase could and probably would be the subject of a petition for judicial review and a stay of the order. The suspension power of Section 15(7) of the Interstate Commerce Act would be rendered a nullity and the courts would be flooded with suits to review, enjoin, annul and set aside the thousands of suspension orders entered each year under the authority conferred by the Interstate Commerce Act.

In light of the emphatic and repeated holdings of this Court that there should be no judicial interference with Commission suspension proceedings, petitioners' claims

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[3] See Section III, pp. 12-18, *infra*. Commission suspension orders, including the order under review here, normally include stated reasons for the suspension and, in addition, sometimes reference an acceptable standard.

regarding the suspension power do not raise any new questions meriting further review.

III. THE COMMISSION'S SUSPENSION ORDER DID NOT PRESCRIBE OR FIX RATES

A. There Is No Conflict Between The Fifth And District of Columbia Circuits

Petitioners contend that the Fifth Circuit's decision here is in conflict with the District of Columbia Circuit's decision in *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). However, both the Commission's opinion (App. C-6) and that of the Fifth Circuit (App. A-14) gave careful consideration to *Moss*. Both concluded that *Moss* was readily distinguishable and not applicable.

In *Moss* the CAB had attempted, in effect, to prescribe rates of a permanent nature without the benefit of a full hearing. Further, it had attempted to do so by setting forth a *new* tariff formula, and, compounding the problem, it had done so after substantial *ex parte* contacts with those standing to benefit from the new formula. The court stated: "We are dealing with a complete and innovative scheme for setting all passenger rates for the continental United States," adding that "it set forth a step-by-step formula requiring *major changes* in ratemaking practices and in rates which it expected carriers to adopt." 430 F.2d at 899 (emphasis added).

The present case is not similar to *Moss* in several respects. This case is concerned with tariffs of a seven-month temporary nature, not permanent tariffs.[14] Second, the temporary tariff levels were calculated on the basis of a traditional ICC methodology, not on the basis of a new,

[14]The investigation before the Federal Energy Regulatory Commission, OR78-1, which will ultimately determine the level of lawful rates, is in its initial stages.

particularized formula. And, finally, there were no improper *ex parte* contacts between the Commission and any parties.

B. The Commission Was Not Precluded From Indicating Acceptable Rates For The Guidance of Carriers

Petitioners assert that the Commission acted illegally in prescribing or fixing rates without complying with the full hearing requirement of Section 15(1).[15] Their argument only begs the question. The issue is, of course, whether the Commission's action was, in fact, a fixing or prescription of rates, i.e., a determination of the just and reasonable rates to be charged for the future.

As the Fifth Circuit pointed out, the Commission could have simply suspended the rates. (App. A-12-15). Had the Commission done so, there would have been no basis for any claim that it prescribed new rates. The claim that the ICC fixed interim rates has arisen solely because the Commission included in its opinion a discussion of its traditional permitted standard for pipeline rate of return. Having found that the carriers' proposed tariffs far exceeded the traditional standard, even when the standard was modified to permit a higher rate of return, the Commission suspended the tariffs. (App. C-4).

[15]References are also made by the petitioners to the fact that no formal evidentiary record was made prior to the suspension, the implication being that the Commission made its decision without sufficient information. Of course, under Section 15(7) no such record is necessary. However, the Fifth Circuit decision points out the special procedure the Commission followed to ensure that the issues would be fully considered (App. A-5, n. 8), and the extensive information that was before the Commission (App. A-5, n. 8a.). Clearly, the carrier proposed rates were given extraordinary consideration, much more so than would have occurred had the usual Commission suspension procedure been followed.

In order to provide guidance to the carriers in regard to any future filings, the Commission took the simple further step of mathematically applying its liberalized standard to each individual carrier, setting forth maximum rate levels that the Commission would allow to go into effect without a further suspension. It is untenable to claim that the Commission thereby prescribed or set rates, and thus transformed the suspension order into an unlawful prescription of rates. Certainly, the basic considerations of public policy precluding judicial review are no less applicable to a suspension order which contains such helpful, time-saving guidance to the carriers, thereby avoiding unnecessary and numerous future filings.

It should be emphasized that the Commission made no judgments as to the costs claimed by the carriers. To the contrary, the Commission accepted *all* of the pipelines' claimed costs, including: (1) all operating expenses, regardless of amount or to whom paid; (2) all depreciation expenses, reflecting a recovery of the entire cost of construction over an abbreviated "economic life" of only 25 years[16]; (3) all removal costs as estimated by the TAPS carriers, without modification, similarly recovered over a shortened life of only 25 years[17]; (4) all annualized interest

[16]This is a substantially shorter period than the anticipated service life of the pipeline. Bonds for the project generally are being financed on a thirty-year basis. If any oil is found anywhere in Alaska, on shore or offshore, which would be tributary to the TAPS system, it would, of course, lengthen the economic life of TAPS. The U.S. Geological Survey estimates that there is a 95% probability that there are at least 9 billion more barrels of undiscovered but recoverable crude oil reserves in Alaska. Geological Estimates of the United States, Geological Survey Circular 725, Table 4, pp. 28-29.

[17]Removal costs were estimated in a study for Alyeska Pipeline Service Company, the TAPS carriers' agent, at $1.049 million in 1977 dollars. These costs were amortized over 25 years without any increase for inflation or any decrease for the earning capacity of the fund being generated. Order of June 28, 1977 (App. C-18).

costs alleged by the TAPS carriers to be incurred in connection with the debt financing of the cost of construction (including the capitalization of interest charges during construction)[18]; (5) collection of inferred or imputed sums sufficient to pay both federal (48 percent) and state (9.4 percent) income taxes;[19] (6) an allowance for a return on the equity for each of the pipelines in amounts ranging from 50.7 cents to 85.5 cents per barrel.[20]

By not challenging any of the carriers' cost figures, the Commission gave the carriers the benefit of doubt in all cases. The Commission's standard of reasonableness, therefore, was applied solely to unchallenged costs, and, even then, the proposed tariffs were found to permit a return far exceeding the level permitted under the standard. The result was the suspension order.

[18]Interest expenses will be adequately covered by the Commission's allowance of a ten percent (10%) return on "valuation". ICC "valuation" *exceeds* the original cost or investment by almost one-half billion dollars ($9,733,600,000 versus $9,268,475,000). (App. C-18, 19). Since, on the average, TAPS is at least 85 percent debt financed, coverage of the cost of capital on 85 percent of the investment is assured by the payment of interest costs.

[19]There has been no showing by the TAPS carriers that such income taxes, if any, will actually have to be paid. An imputed tax allowance creates a cash flow available to the carrier at no cost until the time, somewhere in the indefinite future, when deferred taxes might have to be paid. *See, The Second National Natural Gas Rate Case,* ____ F.2d ____ (D.C. Cir. 1977); *Memphis Light, Gas & Water Div., v. FPC,* 500 F.2d 798 (D.C. Cir. 1974); *People of the State of California v. FPC,* 506 F.2d 228, 232-33 (D.C. Cir. 1974).

[20]The additional return of 72 cents per barrel to Mobil Alaska Pipeline Company, which has no equity according to all figures made available to the Commission, thereby results in an infinite percentage return to Mobil on its equity. The equity returns vary on a percentage basis from 13.30 percent for Amerada Hess up to 54.25 percent for ARCO.

C. This Court's Decision In *Chesapeake* Supports The Commission's Power To Authorize Specific Interim Rates

By authorizing the filing of interim rates not exceeding certain maximum levels based on the Commission's liberalized standard of unlawfulness, the Commission's order "was directly related to its mandate to assess the reasonableness of the rates and to suspend them pending investigation if there is question as to their legality." *United States v. Chesapeake & Central Ohio R. Co. (Chessie)*, 426 U.S. 500 (1976). As this Court said in *Chessie:*

> The ICC could have simply suspended the rates originally proposed by the railroads for the full statutory 7-month period. Instead, it pursued a more measured course and offered an alternative tailored far more precisely to the particular circumstances presented. 426 U.S. 514.

Under Section 6(7) of the Interstate Commerce Act, the carriers could not lawfully operate without having tariffs on file.[21] On the other hand, while the rates as filed were properly suspended because of probable unlawfulness, there was a level of rates which, at some point, would be reasonable and would be permitted to be put into effect. The question in this case, as it is in every one of the thousands of suspension cases each year, is what level the Commission would permit to be put into effect. The Commission could have left the carriers to their own devices to discover, by repeated sequential filings, what that level would be. Such a procedure would have been burdensome, time-consuming and not to the advantage of anyone, including the pipelines. To avoid the necessity of such a burdensome and time consuming process, the Commission's "measured course . . . tailored precisely to the particular

[21] 49 U.S.C. §6(7).

circumstances presented",[22] was to indicate maximum interim rate levels which would be authorized. The result was to the benefit of all parties before the Commission, and did not change the suspension order into a rate fixing order.

The Commission clearly explained its reasons for suggesting maximum permitted rate levels:

> We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest. App. C-6, 7.

Petitioners do not argue that the Commission lacked the power to permit interim rates to go into effect during the suspension period, but argue that the Commission did not have the power to announce in its suspension order the maximum levels of the interim rates which it would be willing to accept without suspension. However, an authorization of "interim rates not exceeding" specified amounts, contained within a suspension order, is not a "prescription" of rates which would be valid, under Section 15(1)[23] of the Act, only "after full hearing."

In contrast to *Arizona Grocery Company v. Atchison Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 386 (1932), the Commission did not here "declare a specific rate to be the reasonable and lawful rate for the future." Here, the interim rates are the subject of continuing "scrutiny" or in-

[22] *United States v. Chespeake & Ohio R. Co.*, 426 U.S. at 514.

[23] 49 U.S.C. §15(1).

vestigation and possible refund or reparation. This alone indicates the interim rates were not considered to be prescribed by the ICC. In fact, the Commission specifically stated that "such rates if filed, remain subject to Commission scrutiny and are not to be considered as prescribed within the meaning of the decision in *Arizona Grocery v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370." (App. C-6). The interim rates are not in effect or prescribed for the future because they will expire at the end of the suspension period.

IV. THE "KEEP ACCOUNT" REFUND PROVISION REQUIREMENTS OF THE ICC ORDER DO NOT WARRANT REVIEW.

Petitioners argue that the Commission's refund provisions which apply to both the initial rates and the interim rates are beyond the statutory powers of the ICC. This contention neither raises a substantial question of law nor involves a present case or controversy. The "refund provision" required by the ICC order does not have any present effect on any rights of the parties because it is entirely prospective and conditional. No obligation arises under the refund provision unless and until there is a finding at a later date that the rates collected exceed the rates which are ultimately authorized, approved or prescribed.[24]

There has been no final determination by the ICC that either the initial rates or the interim rates exceed a maximum, just and reasonable rate. That determination is the subject matter of the pending investigation. Accordingly, at this time, there is no present case or controversy over the amount of any refund which ultimately might have to be paid.

At present, the refund provision is no more than a "keep account" order requiring the carriers to maintain records of the amounts collected under the tariffs and from whom they are collected. Such an order is not restricted by the

[24] *See*, ICC Order of June 28, 1977 (App. C-15, 16).

refund language of Section 15(7). The Commission has broad powers under Section 20 of the Interstate Commerce Act to require the maintenance of special accounts. That section provides:

> The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers and their lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys, and it shall be unlawful for such carriers or lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. 49 U.S.C. §20(5).

In other cases, this Court has upheld the Commission's broad authority to require the keeping of accounts and records. *See, e.g., Norfolk & Western Ry. v. United States*, 287 U.S. 134 (1932); *Kansas City Southern Ry. Co., v. United States*, 231 U.S. 423 (1913); *I.C.C. v. Goodrich Transit Co.*, 224 U.S. 194 (1912). Thus, there should not be any substantial question as to the propriety of the Commission's exercise of similar authority in its suspension order.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-452

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,

—against—

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

MOBIL ALASKA PIPELINE COMPANY'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOBIL ALASKA PIPELINE COMPANY'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Mobil Alaska Pipeline Company, respectfully submits this brief in reply to the Brief for the Federal Parties in Opposition ("Fed. Br.") and the Brief in Opposition for Respondents, the State of Alaska and Arctic Slope Regional Corporation ("Alaska Br.").

QUESTION PRESENTED

The broad question presented is whether section 15(7) of the Interstate Commerce Act confers upon the agency which administers that act unreviewable, discretionary power either to forbid the operation of a newly constructed pipeline for a seven-month "suspension" period or to dictate the rates, terms and conditions under which such a pipeline may be operated during such period. The petition for writ

of certiorari argued that the legislative plan imposed limitations upon the authority of the regulatory agency.[1]

ARGUMENT IN REPLY

Respondents do not deny that, if the regulatory agency possesses the arbitrary power which it asserts, then it may inflict irrecoverable loss on new carriers without opportunity for fair hearing or judicial review. Respondents contend that the summary exercise of such power may give the public the immediate benefits of reduced rates on new pipelines (Fed. Br. 7; Alaska Br. 10), but they ignore the question whether the existence of such power might in fact deter construction of needed pipelines.[2]

Respondents' principal argument appears to be that the literal terms of section 15(7) authorize suspension of any tariff containing a "new rate," and that a new carrier's original rate is "new"; that Congress has given the agency absolute discretion whether to suspend; and that if the agency has discretionary power to suspend a rate it must

1. Petitioner contends (1) that Congress did not intend to authorize suspension of a carrier's original tariff (Pet. 17-21), (2) that suspension of a tariff is lawful only upon a finding that preservation of the status quo is preferable, in the public interest, to commencement of service at the new rate (Pet. 22), and (3) that suspension may not be used to compel adoption of rates fixed by the regulatory agency without fair hearing or opportunity for judicial review (Pet. 25).

2. For a forecast of the future need for pipelines, *see generally* U.S. DEPARTMENT OF TRANSPORATION, NATIONAL TRANSPORTATION TRENDS & CHOICES (TO THE YEAR 2000) at 289-302 (advance printing 1977).

Although some of the loss which petitioner incurred as a result of the Commission's action was recouped by petitioner's parent, a shipper of oil on the pipeline, the parent produces only about 2% of North Slope oil, while petitioner owns 5% of the pipeline capacity. In consequence some 60% of the oil transported by petitioner is produced by unrelated parties. *See* Pet. 5 n. 3. Accordingly, petitioner's losses are real and substantial. In contrast, due to pricing and market structure in the oil industry, consumers gained no benefit from the ICC's imposition of lower rates in the instant case. *See* Pet. 7. Respondents have not disputed this point. *See* Pet. App. A-17.

also have power to decree in advance what rates it will and will not suspend, even though the statute authorizes it to make rates only after full hearing. Respondents' chain of reasoning disregards the purpose and intention of Congress.

1. Congress Did Not Authorize Suspension of a New Carrier's Original Tariff.

The reason Congress authorized suspension of "new rates" was to ensure that service would continue to be available at the old rates, that the status quo of transportation would be preserved during an investigation. Congress deemed it consistent with due process to require the carrier to postpone a change in rates which it had previously established for itself.[3] Congress contemplated suspension only where the carrier could continue its prior rates and services, not where the result would be total blockage of service by a new railroad or pipeline. *See* Pet. 15-16.

Respondents seek to suggest both that it is well established by prior agency practice that an original rate may be suspended and that the question has never arisen before and is unimportant. *Compare* Fed. Br. 6 and 8. The question appears to have arisen at least twice before, and on those occasions the Interstate Commerce Commission rejected suspension of a carrier's only tariff as inherently unfair (*In re Wharfage Charges of the Galveston Wharf Co.*, 23 I.C.C. 535, 537 (1912)) or held that it was "without jurisdiction" to order suspension, *Restriction in Routing Between Greenwood and Augusta*, 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line Railroad* v. *United States*, 48 F.2d 239, 245 (W.D.S.C. 1931), *aff'd*, 284 U.S. 288 (1932). The case upon which respondents rely as evidence of a contrary practice, *Rail-Water, Grain in Bulk, Missouri, Illinois*

3. *See, e.g.*, 45 CONG. REC. 6504 (1910) ("the railroad having once established a rate, it must be accepted as at least high enough not to confiscate its property . . . .") (remarks of Sen. Bailey); *id.* 6509 (Sen. Crawford); *id.* 6510-11 (Sen. Cummins); *id.* 5845 (Rep. Madden, quoting Commissioner Clements).

and Indiana to Buffalo, 321 I.C.C. 564, 566 (1963) (Fed. Br. 6, Alaska Br. 5), did not concern a new carrier's original rate, but rather the decision of an established carrier by water to file a new joint rate, in collaboration with a railroad, which would permit through shipments of grain by rail and water. There was no question but that the Commission could suspend the new joint rate and require the two carriers to continue to ship grain in accordance with their prior separate practices. The only question raised was whether the water carrier which filed the joint rate had the burden of proving the rate reasonable, a burden which, under the enactment of 1910, was imposed only in respect of an "increased rate" (Mann-Elkins Act of 1910, ch. 309, § 12, 36 Stat. 552) but since 1940 has been imposed in respect of any "changed rate." 49 U.S.C. § 15(7) (Transportation Act of 1940, ch. 722, Title I, § 10(c), 54 Stat. 912). For purposes of burden of proof, the Commission held that the rate in question was not "changed" but "initial" (321 I.C.C. at 566), a category not referred to in section 15(7), which in Commission practice encompasses somewhat novel services offered by established carriers.[4] The Federal Power Commission, administering suspension provisions which are phrased in similar terms, has established by rule that it is without authority to suspend "initial rates" (18 C.F.R. §§ 2.4(d), 2.52 (1977)), and that Commission uses the term to mean original rates, such as those of a public utility or natural gas company commencing interstate operations under a certificate of public convenience and necessity, which do not "supersede, supplement, cancel or otherwise change" schedules previously on file. 18 C.F.R.

4. *See* Pet. 19-20 n. 21. *See also, e.g., Animal Feed from Mississippi and Tennessee to Midwest and Southwest,* 316 I.C.C. 94 (1962) (established motor carrier which had been transporting fertilizer filed "initial rates" for carriage of feed on same route); *Bituminous Coal via Motor-Rail from Lynnville, Ind., to Chicago, Ill.,* 313 I.C.C. 573 (1961) (established carriers filed joint rate for through transport of coal).

§ 35.1(b) (1977). *See Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, 146 (1960) ("when a producer commences interstate sales from a particular field . . . there are by definition no existing rates, and accordingly [the suspension provisions], which are bottomed on delaying the effectiveness of, and suspending, changes, are not relevant"). When Congress has focused its attention upon the question whether the suspension power might be used to block service by a new entrant in a regulated industry, it has provided that it could not be so used (Federal Aviation Act, § 1002, 49 U.S.C. § 1482(g) (1976)), except in cases where the agency otherwise has power to block the commencement of service by withholding a certificate of public necessity and convenience.[5] Prior to granting such a certificate the agency must of course review and approve the new entrant's original rates. *See Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959).

2. Congress Intended Suspension as a Tool to Maintain the Status Quo Pending Investigation.

In accordance with the purpose of Congress, the Interstate Commerce Commission has traditionally exercised the suspension power as "an emergency measure to preserve the *status quo* until determination can be had as to whether certain proposed acts are legal." *Vulcan Detinning Co.* v. *New York Central Railroad Co.,* 203 I.C.C. 260, 261 (1934). "[I]t is contemplated that the rates sought to be increased or otherwise changed are to be continued in

5. *Compare* 49 U.S.C. §§ 316(g) and 306(a)(1) (motor carriers); 907(g), (i) and 909(a) (water carriers); 1006(e) and 1010(a)(1) (freight forwarders); *see* Pet. 21 & n.20. The same rationale explains the recent decision of Congress to authorize suspension of original rates of carriers under the Federal Communications Act (*see* Alaska Br. 7), since the FCC already had power to block commencement of operations under that act by withholding a certificate of public convenience and necessity, 47 U.S.C. § 214 (1976).

effect. . . . th[illegible] status quo will be maintained. . . ." *Class Rates Between Stations in Louisiana,* 33 I.C.C. 302, 303 (1915). Since the shipper may obtain a refund if a new rate should prove excessive, and since the carrier has no recourse if his tariff should prove inadequate, a summary finding that a new rate might be excessive or otherwise suspect is not in itself sufficient to justify suspension. Suspension should be permitted only if the Commission also finds, on balance, that continuation of the status quo is preferable, in the public interest, to commencement of service at the new rate. Such a finding is implicit in a decision to require maintenance of service at an old rate. In the instant case, however, the Commission held that it was "contrary to the interests of all concerned" to postpone the commencement of service on the Trans-Alaska Pipeline. Pet. App. C-7. But the Commission suspended the tariffs anyway, on the assumption that it could thus coerce the carriers into filing different interim tariffs at rates fixed by itself.

The Alaskan respondents contend that the Commission had absolute, unreviewable power to suspend the tariff (Alaska Br. 8), but it could scarcely be contended that the Commission might offer as justification for a suspension that it had flipped a coin or based its decision on some other consideration inconsistent with the purpose of Congress. The decisions of the District of Columbia Circuit have recognized a distinction between *bona fide* suspensions, consistent with the purpose of Congress, and " 'sham' suspensions aimed at coercing behavior rather than merely preserving the status quo pending investigation." *Continental Airlines, Inc.* v. *Civil Aeronautics Board,* 522 F.2d 107, 129 (D.C. Cir. 1975); *Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970). The Court of Appeals for the Fifth Circuit erred in the instant case in disregarding that distinction.

3. Congress Sought to Ensure Procedural Fairness in Ratemaking.

Congress provided that the Interstate Commerce Commission should fix rates only after full hearing and upon a record which allowed judicial review. It thus sought to ensure that carriers would be allowed to operate either at rates fixed by themselves or at rates fixed by the Commission with due process of law. Respondents contend, however, that the Commission can achieve the effective result of fixing rates through exercise of the suspension power, without the prescribed hearing. Extending their claim that the Commission may suspend a rate for any reason, respondents contend that the Commission may also decree in advance what rates it shall suspend, without allowing the carrier to be heard in respect of the rate finally approved by the Commission. In respondents' view, the Commission actually does the carrier a favor if it fixes maximum rates in this manner, as it obviates the necessity for "ponderous" and "unnecessary" procedures. Fed. Br. 11-12; Alaska Br. 13-14. Respondents would disregard the fact that Congress devised the statutory plan in order to ensure compliance with due process. The rough and summary procedure for which respondents contend would impose loss upon new carriers without fair hearing and in a manner not contemplated by Congress.

CONCLUSION

In authorizing construction of the Trans-Alaska Pipeline, Congress implicitly promised that those who undertook that task would be allowed to earn a fair return on their investment, and that the amount of such return would be determined in accordance with fair and lawful procedures. The question whether that promise shall be honored is an important question which should be settled by this Court. It is a tenet of the popular wisdom that private investment is

often more efficient than government expenditure. If private investment is to retain a role in our mixed economy in the accomplishment of such projects, it is important that this Court reaffirm the procedures which Congress intended to safeguard such investment. Petitioner does not contend that it should be allowed to earn an unreasonably high return on its investment but that the rate of such return should be judged and determined upon a fair hearing, with due process of law, upon a record which allows judicial review.

Accordingly, for the reasons set forth above and in the petition for writ of certiorari, the petition should be granted.

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In The

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. and ARCO PIPE LINE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT BRIEF FOR THE PETITIONERS

(*For List of Counsel, See Inside Cover*)

January 12, 1978

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In The

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551 and 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. and ARCO PIPE LINE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit (746a) is reported at 557 F.2d 775.

Jurisdiction

The judgment of the Court of Appeals was originally entered July 29, 1977. 772a. The petition of BP Pipelines Inc. for rehearing was denied on September 8, 1977. 774a. Petitions for writs of certiorari were filed Sep-

tember 22, 1977 (Nos. 77-452 and 77-457), October 12, 1977 (No. 77-551) and October 25, 1977 (No. 77-602). The petitions were granted November 28, 1977, and the cases consolidated for argument. 789a. The jurisdiction of the Court is based on 28 U.S.C. §§ 1254(1) and 2350(a).

Questions Presented

1. Does section 15(7) of the Interstate Commerce Act authorize the Commission which administers that act to suspend the original tariff schedules of an interstate oil pipeline, whose operation has been duly authorized by Congress, where the effect of such suspension is to leave the pipeline without any schedules and to forbid it to operate while the suspension continues?

2. If the Commission does possess the power to suspend such original schedules, may it exercise such power, not to preserve the status quo of transportation but in order to compel the carrier to provide service during the suspension period at lesser rates summarily fixed by the Commission?

3. If the Commission may suspend such original schedules and if it may do so in order to compel adoption of interim rates fixed by itself, may it fix such interim rates without full hearing and without creation of a record which would permit judicial review of the adequacy of such rates under the standards of the Interstate Commerce Act and the Constitution?

4. May the Commission require, as a "valid corollary" of its suspension power, that a carrier waive its right to have the amount of any reparations it may owe determined in accordance with the procedures established by law?

Statutory and Constitutional Provisions Involved

These cases concern Part I of the Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976), as amended, notably by the

Hepburn Act of 1906, ch. 3591, 34 Stat. 584, and by the Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539. Also involved are sections 2 and 3 of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651, 1652 (Act of Nov. 16, 1973, Pub. L. No. 93-153, Tit. II, §§ 202, 203, 87 Stat. 584). The relevant provisions of these statutes are set forth in the Statutory Appendix to this Brief. The cases also present issues arising under the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

These cases raise the question whether section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7) (1976), confers upon the agency which administers that act arbitrary, unreviewable power either to forbid the transport of oil over a newly constructed oil pipeline for a seven month suspension period or to dictate the rates, terms and conditions upon which such a pipeline shall be operated during such period.[1] The question arises with respect to the Trans Alaska Pipeline System ("TAPS"), an 800-mile crude oil pipeline whose construction was specially authorized by act of Congress. 43 U.S.C. §§ 1651, 1652(a). Petitioners are

1. Until October 1, 1977, the Interstate Commerce Commission was charged with authority to administer all provisions of the Interstate Commerce Act. On that date, however, pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (August 4, 1977) (to be codified in 42 U.S.C. §§ 7101-7352), and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), regulatory responsibility for establishment of rates and valuation of oil pipelines was transferred to the Federal Energy Regulatory Commission (FERC).

four of the eight owners of TAPS. Three of the other owners have intervened in these cases.[2]

Background Facts

Following discovery of large reserves of crude oil on Alaska's North Slope in 1968, plans were announced to build a pipeline to transport crude oil from Prudhoe Bay on the Alaskan North Slope across arctic wilderness to the ice free port of Valdez on the Gulf of Alaska. Construction of the pipeline, scheduled to begin in 1970, was delayed until 1974 by litigation over environmental issues.[3]

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2. The eight carriers who share TAPS ownership are:

Sohio Pipe Line Co.	(Intervenor)	33.34%
ARCO Pipe Line Co.	(Petitioner)	21.00
Exxon Pipeline Co.	(Petitioner)	20.00
BP Pipelines Inc.	(Petitioner)	15.84
Mobil Alaska Pipeline Co.	(Petitioner)	5.00
Phillips Alaska Pipeline Corp.	(Nonparty)	1.66
Union Alaska Pipeline Co.	(Intervenor)	1.66
Amerada Hess Pipeline Corp.	(Intervenor)	1.50
		100.00%

The TAPS owner which is not a party here, Phillips Alaska Pipeline Corp., filed its tariff later than the other carriers, and the Commission suspended that tariff several weeks after the suspensions here at issue. Phillips Alaska has challenged the ICC's action in the Court of Appeals for the District of Columbia Circuit and that court has granted it the same interim relief which this Court has granted the other parties, deferring decision on the merits pending the decision of this Court. *Phillips Alaska Pipeline Corp.* v. *ICC,* No. 77-1741 (D.C. Cir., filed August 17, 1977).

3. *See, e.g., Wilderness Society* v. *Morton,* 479 F.2d 842 (D.C. Cir.), *cert. denied,* 411 U.S. 917 (1973); 748a, n.2. On the way to Valdez, TAPS crosses some of the most rugged terrain in North America, some 800 rivers and streams, flood plains, and high mountain passes. 189a-204a. The impact of TAPS on this wilderness environment caused concern to TAPS owners as well as to others. Unusual engineering problems resulted from the presence of permafrost, a permanently frozen subsurface layer covered in many places by a seasonal freeze-thaw layer with surface vegetation called tundra. The

Congress ended the delay caused by these disputes when it enacted the Trans-Alaska Pipeline Authorization Act on November 16, 1973, declaring that "[t]he earliest possible construction of a trans-Alaska oil pipeline . . . will best serve the national interest," and that "[t]he early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources." 43 U.S.C. § 1651 (1976).[4] TAPS construction was completed in June 1977 at a total cost of more than $9 billion.[5]

Under the form of ownership which the TAPS owners have adopted, each holds an undivided interest in the system as its separate property. Each has the right and obligation to utilize its share of TAPS capacity as an independent common carrier, to transport crude oil for any shipper without discrimination at a fair and reasonable cost consistent with its statutory right to a fair return on investment. 49 U.S.C. §§ 1(5), 15a (1976). As a result of this form of ownership, the TAPS carriers in fact constitute eight separate competing pipelines. Six of the TAPS carriers are directly affiliated with companies engaged in production of Alaskan North Slope oil, but owners of two of the carriers, BP Pipelines Inc. and Union Alaska Pipe-

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heat caused by pipeline construction and by the transport of hot crude oil through the pipeline created risks both to this ecologically fragile environment and to the stability of the pipeline, requiring development of innovative design techniques. Frequent seismic activity further complicated the goals of environmentally safe construction and operation.

4. Pub. L. No. 93-153, § 202, Tit. II, 87 Stat. 584.

5. In the Commission order at issue herein, total cost was estimated at appoximately $9.2 billion. *See* estimates at 640a. The most current cost estimates, submitted by the TAPS owners to the FERC on November 30, 1977, indicate a total construction cost of $9.084 billion, including approximately $1.275 billion in interest costs incurred during construction and capitalized.

line Co., own none of the oil now in production. Other carriers own a larger percentage of pipeline capacity than their affiliates' share of North Slope oil. Such carriers cannot rely on their affiliates to supply sufficient oil for shipment at full capacity, but must compete for shipments from North Slope producers who own no interest in TAPS or whose production exceeds their affiliates' share of pipeline capacity. A table showing the comparative interests in the pipeline and in current oil production is set out in the footnote below.[6]

As TAPS construction neared completion, each carrier independently calculated and adopted a schedule of rates for interstate shipment. Pursuant to the regulation which requires that original pipeline tariffs be filed with the Interstate Commerce Commission ("Commission" or "ICC") on not less than ten days' notice (49 C.F.R. § 1300.57(e) (1976)), seven TAPS owners filed tariffs between May 30 and June 10, 1977.

6. Comparative Table:

	Net Interest in Oil Rim Participating Area of the Prudhoe Bay Unit	TAPS Interest of Subsidiary
Standard Oil Co. (Ohio)	46.511	33.34
Atlantic Richfield Co.	17.740	21.00
Exxon Corporation	17.740	20.00
State of Alaska	12.500	—
Mobil Oil Corp.	1.832	5.00
Phillips Petroleum Corp.	1.789	1.66
Amerada Hess Corp.	.471	1.50
British Petroleum Co. Ltd.	—	15.84
Union Oil Co. of California	—	1.66
[Ten Other Producers]	1.417	—
	100.000%	100.00%

This table shows only the interests of producers in the reservoir of oil which is currently in production. The producing interests in reserves which may be found or tapped in the future cannot be predicted at this time. (Figures are taken from verified statement of R. Gary, Morgan Stanley & Co., Nov. 30, 1977, submitted in FERC OR78-1, *Trans Alaska Pipeline System,* which has been lodged with the Clerk.)

Proceedings Before the Commission

On June 13, 1977, the Commission issued a notice of a special suspension proceeding, pursuant to 49 U.S.C. § 15(7), to consider suspension of the seven TAPS tariffs then on file. 2a.[7] The notice provided that, contrary to the usual rule in suspension cases (*see* 49 C.F.R. § 1100.200), this proceeding was to bypass the Commission's staff suspension board and its appellate division of three Commissioners and would instead be presented directly to the full Commission. 2a.

Four parties — the State of Alaska, the Arctic Slope Regional Corporation ("ASRC"), the Antitrust Division of the Department of Justice, and the ICC's Bureau of Investigations and Enforcement (the "Bureau") — filed protests challenging the TAPS tariff rates as too high. Each protestant urged that the Commission suspend the original tariffs and prescribe lower "interim" tariff rates at which the pipeline should be operated during the suspension period. Alaska and ASRC, now respondents before this Court, asserted their financial interests in minimizing the TAPS tariff rates as grounds for intervention.[8] The

7. At the Commission's request, carriers whose tariffs bore effective dates prior to June 30 filed amendments so that no tariff would be effective before June 30. Suspension of a tariff is effective only if ordered prior to the tariff's effective date. 49 U.S.C. § 15(7).

8. When Alaska sold the Arctic Slope oil leases in 1969 for a record $900 million, it retained a royalty right to 12½% of the oil produced, payable in kind or in cash, based on the value of the oil at the wellhead. Wellhead value is found by taking the sales price of the oil as delivered at refineries in the lower 48 states and subtracting certain processing charges and all transportation charges back to the North Slope. Accordingly, wellhead value goes up as the pipeline tariff goes down. In addition to its 12.5% royalty, Alaska imposes a severance tax averaging 11.5% of the wellhead value of all oil produced except its own. Thus, with respect to both its royalty and tax interests, Alaska has a stake in securing a low pipeline transportation charge in order to maximize wellhead value.

Department of Justice asserted an antitrust theory, contending that higher rates would discourage independent oil companies from developing North Slope leases in competition with the carriers' affiliates, while lower rates would make such competition more advantageous for the independents. Consumer interests did not protest the tariffs, as the price of Alaskan crude oil delivered at the refinery is not affected by the cost of pipeline transport.[9] TAPS owners maintained that their original tariffs were reasonable as filed, and that suspension of those tariffs and prescription of interim rates was not authorized by the Interstate Commerce Act.[10]

A hearing, for purposes of oral argument only, was held before the Commission on June 27, 1977. The Commission, in accordance with its rule in suspension cases, took no evidence.[11] The Bureau asserted that, if the Commission suspended the original tariffs and decreed a maximum interim rate, then the carriers would be obligated to file an interim tariff at that rate and to furnish transportation to the public or face prosecution for failure to perform the duties of a common carrier. App. (Vol. III) Ex. 1,

ASRC is one of 12 corporations established to conduct native Alaskan business for profit by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627. *See* 749a, n. 7. ASRC released its claims of aboriginal title to the oil fields in exchange for a statutory right to a 2% royalty, which is taken out of Alaska's royalty, but subject to a ceiling of $500 million. 43 U.S.C. § 1608 (1976). Thus, although ASRC is expected to receive the full cash amount in any case, it will receive it at a faster rate if TAPS rates are minimized.

9. The Economic Regulatory Administration of the Department of Energy imposes a maximum price on Alaskan crude as delivered at refineries in the lower 48 states, 10 C.F.R. § 212.74, *see* 42 Fed. Reg. 41565 (August 17, 1977), and in practice the oil sells slightly below the maximum, at a price fixed by supply and demand in close and direct relation to the price of imported crude which, in turn, is fixed by the OPEC nations.

10. Most of the protests and replies thereto have been reprinted in Volume I of the Appendix.

11. *See* 49 C.F.R. §§ 1100.19, 1100.200 (1976).

145-47. The Antitrust Division warned that any collective failure by the carriers to file tariffs at interim rates dictated by the Commission would prompt the Division to consider action under the Sherman Act. App. (Vol. III) Ex. 1, 119-21.

On the following day, June 28, 1977, the Commission entered an order in which it: (1) suspended seven TAPS rate tariffs for the maximum seven-month period specified in 49 U.S.C. § 15(7)[12]; (2) instituted a formal adjudicatory investigation into the lawfulness of the suspended rates pursuant to 49 U.S.C. §15(1); (3) fixed maximum interim rates to be effective during the suspension period, and authorized the TAPS owners to refile, on one day's notice, tariffs at those rates; and (4) conditioned the effectiveness of both the original tariffs and the prescribed "interim" tariffs on the carriers' undertaking to make refunds to shippers in the event that the Commission ultimately determined that the interim rates or original rates were unlawfully high. 636a-39a. A comparison of the carriers' original rates and the different interim rates which the Commission fixed for each carrier is set forth below.

	Original Rates	"Interim" Rates	Reduction	% of Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59	24.7%
ARCO Pipe Line Co.	6.04	4.91	1.13	18.7%
BP Pipelines Inc.	6.35	4.68	1.67	26.3%
Exxon Pipeline Co.	6.27	5.10	1.17	18.7%
Mobil Alaska Pipeline Co.	6.31	4.84	1.47	23.3%
Phillips Alaska Pipeline Corp.	6.22	4.87	1.35	21.7%
Sohio Pipe Line Co.	6.16	4.70	1.46	23.7%
Union Alaska Pipeline Co. ..	6.09	4.89	1.20	19.7%

The Commission's order recognized that the carriers' original tariffs would be effective upon the expiration of the suspension period, January 29, 1978, if the investigation had not been completed before that date. 628a.

12. The tariff of Phillips Alaska Pipeline Corp., the eighth owner, was filed June 20, 1977 and suspended July 19, 1977.

The Commission noted that if it allowed the carriers' original rates to go into effect and later adjudged them excessive, the carriers would be required to make reparations to shippers to the extent of any excess previously collected. 627a, 629a.[13] And the Commission acknowledged that, under the statutory scheme, the carriers themselves "may have no means of obtaining restitution" if the Commission should ultimately determine that the interim rates were fixed at improperly low levels. 629a. Nonetheless, the Commission concluded that suspension was justified on the grounds that protestants had made "a showing of probable unlawfulness." 627a. The Commission did not find, however, that preservation of the status quo was preferable to commencement of operations at the carriers' original rates. It held, instead, that suspension "without allowing interim rates" would be "contrary to the interests of all concerned" because it would block the commencement of operation by the pipeline. 629a.

In its calculation of interim rates, the Commission relied "for the most part" on a "staff estimate" of the value of each carrier's interest in the pipeline, apparently derived from cost data which had been supplied informally by the carriers. *See* 630a, 640a-43a. Using an assumed throughput of 1.2 million barrels per day, the Commission fixed each carrier's tariff according to a formula set forth in the order.[14] Without stating reasons or considering the evi-

13. Under 49 U.S.C. § 8, carriers are liable for reparations equal to the "full amount of damages" caused by previous exaction of an excessive rate, together with interest. *Louisville & Nashville R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925). A court may also award reasonable attorney's fees in connection with such reparations. *ICC* v. *Atlantic Coast Line Ry.*, 383 U.S. 576 (1966).

14. The carriers had provided data informally, as well as in reply to the protests, demonstrating that maximum throughput during the first seven months of operation could attain little more than one million barrels per day. 580a, 583a-86a. Subsequent experience has

dence as to the financial risks of the project that might have been offered at an evidentiary hearing, the Commission concluded that its interim rates would provide a return sufficient to attract capital under the standard of *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). 634a. While the carriers contended that the relevant return should be calculated as a net percentage of valuation, after payment of interest costs, the Commission used as the relevant figure a gross percentage and did not permit the carriers to deduct their interest costs as a cost of doing business.[15]

On September 27, 1977, three days before the ICC was divested of pipeline jurisdiction by transfer of such authority to the Federal Energy Regulatory Commission, the ICC denied the carriers' petitions for reconsideration of the order fixing the interim rates. In denying the petitions, however, the Commission acknowledged that it had calculated the interim tariffs using higher throughput figures than it had anticipated would actually be possible during the pipeline's startup period, but stated that "we did not consider it suitable to use the throughput level of a short initial period, such as the suspension period," as a basis for calculating the interim rate for such a period. 777a. Three commissioners dissented, recommending that the interim tariffs be increased by 42 cents per barrel. 781a.

shown that the throughput was substantially less than even the carriers anticipated during the period, in part because of damage caused by an explosion and fire at TAPS Pump Station No. 8 on July 8, 1977. This accident reduced the pipeline's projected throughput for the suspension period to only 730,000 barrels. Repairs to the pump station are expected to be complete by March of 1978. *See* Prepared Direct Testimony of Gordon Hutchinson, Nov. 30, 1977, at pp. 15, 27 (FERC No. OR78-1, *Trans Alaska Pipeline System*). A copy of this testimony has been lodged with the Clerk of the Court. *See also* N.Y. Times, July 11, 1977, at 40, col. 1; *id.*, July 13, 1977, § IV, at 16, col. 5.

15. The Commission stated no reason for making the calculation in this manner and the carriers contend that it deviated without explanation from prior practice. 625a. *See, e.g.*, 425a-32a. *See Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800 (1973); *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

Proceedings Before the Court of Appeals

Pursuant to 28 U.S.C. §§ 2321(a) and 2342(5), petitioners separately invoked the jurisdiction of the United States Court of Appeals for the Fifth Circuit to review and reverse the suspension order.[16] Petitioners sought preliminary injunctive relief, pursuant to 28 U.S.C. § 2342(5), asserting that, if they were compelled to commence operations at the lesser rates fixed by the Commission, they would incur irreparable loss; that, if it were ultimately determined that the Commission's interim rates were fixed at improperly low levels, there would be no way to recover the balance of the fair charge for transportation from shippers who had used the pipeline in the meantime; and that the interim rates were in fact so low as to force pipeline operation at a net loss (650a-52a, 619a-21a), though not so great a loss as the carriers would have incurred if the pipeline stood idle for seven months. Petitioners also pointed out that, unless the court granted injunctive relief permitting collections to be made under the carriers' original tariffs, the amounts at issue would be dissipated day by day during the suspension period, depriving the court of power to effect a remedy. The United States, through attorneys for the Antitrust Division who had previously appeared before the ICC, moved to dismiss on the ground that the June 28 order was an exercise of the Commission's discretionary power and, therefore, not subject to judicial review. 726a.

Following oral argument on the motions for preliminary injunctive relief and on motion to dismiss, a divided panel of the Court of Appeals dismissed the consolidated cases on July 29, 1977. Declaring that the reference in 49 U.S.C. § 15(7) to "any schedule stating a new . . . rate" had no "plain meaning," the majority concluded that the Commission was empowered to suspend an original tariff, and that

16. Venue was properly fixed in the Fifth Circuit because the principal place of business of Mobil Alaska Pipeline Company, the first carrier to file a petition, is in Dallas, Texas. 28 U.S.C. § 2343.

such a decision was not reviewable under the statute. 754a-57a. The majority appeared to agree that the Commission had no power to fix interim rates. It held, however, that the Commission had not in fact done so, but had merely "partially waive[d]" its discretionary power to suspend, giving the carrier a choice of operating on the Commission's terms or not at all. 757a-58a. *See* 49 U.S.C. § 6(7). Acknowledging that Constitutional standards might require that, in some cases, a court should review the action of the Commission in fixing a maximum interim rate, the majority stated that a record which would permit such review was lacking in the present case. 761a. The majority acknowledged that TAPS losses would be "irretrievable" and that the carriers estimated those losses at some $340 million. 754a.[17]

In dissent, Circuit Judge Roney argued that in fixing a maximum interim rate the Commission had exceeded its power to suspend a tariff. He was prepared to assume, without deciding, that the Commission could suspend a pipeline carrier's original tariff, but would have held such suspension reviewable where the absence of pre-existing rates left the carrier without any tariff. 763a. In his view, if the Commission did seek to fix interim rates, it was required to do so in accordance with procedural standards and upon a hearing record which afforded a basis for judicial review. 764a-65a. He also concluded that "the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative risks of equity capital," and that it was "arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor." 771a.

17. In view of the reduction in pipeline capacity which resulted from the July 8 explosion at a TAPS pumping station, it is now clear that great loss would have been incurred even if the carriers had been allowed to commence operations at their original rates. *See* note 14, *supra*.

The Court of Appeals rendered its decision at about the same time that the first shipment of oil reached Valdez. Thereafter, in order to limit their losses and permit the transport of North Slope Oil to the lower 48 states, the carriers filed tariffs at the interim rates set forth in the Commission's June 28 order.[18]

Petitioners operated at those rates, incurring irreparable loss day by day, until October 20, 1977, when this Court granted the applications for injunctive relief made in Nos. 77-452, 77-457 and 77-551, permitting collection to commence at the rates provided in the carriers' original tariffs, subject to the requirement that the carriers account for and refund "any portion of the amounts collected under such rates by virtue of the stay which it is ultimately determined that they were not lawfully entitled to collect." 784a. The order was superseded by an order issued November 14, 1977 which contained similar provisions, and which was made applicable to all seven of the carriers involved in these cases. 785a.

SUMMARY OF ARGUMENT

The Commission's order, as affirmed by the Court of Appeals, has circumvented the regulatory plan established by Congress in the Interstate Commerce Act. Under that act, an interstate oil pipeline may unilaterally establish and put into effect its original rates. The Commission is empowered (1) to investigate the rates set by the carrier, to determine whether they are just and reasonable; (2) to prescribe rates for the future, if, after full hearing, those set by the carrier are found to be excessive; and (3) to order reparations to any person who proves injury resulting from the unlawful rates. In the instant cases, the Commission exceeded its authority in each of these respects. Its order would frustrate the Congressional plan and has already imposed severe and irrecoverable losses upon the carriers in a manner not intended by Congress. The absence of both statutory and evidentiary support for the Commission's order requires that the Court of Appeals' decision be reversed and the Commission's order set aside.

The Court of Appeals' decision was premised on three erroneous assumptions: first, that the Commission has the power to suspend an original, as opposed to a changed, rate; second, that the Commission's suspension power is absolute and arbitrary; and third, that the Commission may "waive" part of that supposedly absolute power by prescribing rates which it deems acceptable, without following the ratemaking procedure required by statute.

The Commission and the Court of Appeals committed fundamental error in concluding that the Commission may suspend a carrier's original rate. The language, history and purpose of the suspension provision, 49 U.S.C. § 15(7), demonstrate that the Act was intended to strike a delicate balance between assurance of service to the public at lawful rates and the protection of private property rights. A review of the background of the Mann-Elkins Act of 1910,[19] in which the suspension power was introduced, shows that the purpose of the enactment was to vest in the Commission authority to investigate changes in rates before they took effect, and to preserve the status quo of transportation for a limited period pending the investigation. Congress regarded suspension as fair to the carriers and consistent with requirements of due process because carriers were to continue operations during the suspension period at rates which the carriers themselves had previously fixed. There is no suggestion in the legislative history that Congress

18. Petition for rehearing by BP Pipelines Inc. was denied on September 8, 1977 (774a.), as were motions by Exxon Pipeline Co. for stay of the mandate and stay of the ICC order pending petition for review on writ of certiorari. 773a. On that same date the Court of Appeals for the Fifth Circuit also denied a petition for review by Union Alaska Pipeline Company, an intervenor here.

19. Section 12, ch. 309, 36 Stat. 539, 551.

intended that this power should be used to block service on a new line by suspending an original rate, thereby leaving the carrier without any lawful rates for its railroad or pipeline.

Nor may the suspension power, or the threat of its exercise, be employed as a "short cut" to the prescription of rates. This Court has held that the power to fix rates is "of supreme delicacy and importance," and may "not . . . be presumed from any doubtful and uncertain language," *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway,* 167 U.S. 479, 505-06 (1897). Indeed, it was in response to that pronouncement that Congress granted the Commission authority to set rates in the Hepburn Act of 1906. But Congress provided that the Commission might set rates only after "full hearing," so as to facilitate judicial review of the Commission's decision. 49 U.S.C. § 15(1). Thus, Congress established a regulatory plan in which carriers are allowed to operate either at rates initiated by themselves, or at rates prescribed by the Commission in accordance with due process of law, upon a record which allows judicial review. The action by the Commission in these cases disregarded these plain statutory dictates, resulting in the prescription of rates without any evidentiary basis and in a manner which would preclude judicial review. Attempts to cloak such results in the guise of a partial "waiver" of a purportedly absolute power to suspend cannot be sustained.

The Commission further exceeded its statutory authority by imposing unlawful refund conditions upon petitioners. The suspension provision in the Act specifically authorizes the Commission to require carriers to account for and refund to shippers the portion of a "proposed *increased* rate" which is ultimately found to be excessive; but that provision does not authorize the Commission to require that a carrier refund any portion of its *original* rate which may be found to exceed a rate which is subsequently prescribed. Repayment obligations with respect to unlawful original rates arise under the reparations provisions in sections 8 and 15(1) of the Act; those provisions require a quasi judicial determination by the Commission of the amount of any reparations due. Irrespective of the rate the Commission may fix for the future, a carrier is entitled to its day in court on the question whether its original rates were unlawful at the time they were collected, and if so, what the maximum lawful rate would have been at that time.

ARGUMENT

I.

CONGRESS AUTHORIZED SUSPENSION OF NEW RATES, NOT SUSPENSION OF THE ORIGINAL RATES OF A NEW RAILROAD OR PIPELINE.

The Court of Appeals reached the conclusion that the Interstate Commerce Act empowers the Commission to suspend a part I carrier's original rate, leaving it with no rate. In reaching this conclusion, the court expressed the view that the language of the suspension provision, section 15(7), which authorizes the Commission to suspend "any schedule stating a new . . . rate," has no "plain meaning" (755a-56a); but the court appears to have overlooked the draftsman's careful use of interchangeable terms in the same section, where the term "the proposed change of rate" is subsequently used to refer back to and define the "new . . . rate" whose suspension Congress had authorized.[20]

20. The full text of § 15(7) is set forth in the Statutory Appendix to this Brief. The court's construction of section 15(7) fails to read the statutory provision in its entirety, and distorts the sentences within the provision to derive separate and unlikely meaning. There is no indication that Congress intended the words "the proposed change of rate" in the second sentence to mean something less than "any schedule stating a new individual or joint rate. . . ." See the historical discussion *infra,* Point I B, at 24.

And the Court of Appeals disregarded the policy and purpose of the statute.

The reason Congress authorized suspension of schedules stating a "new" rate was to ensure that service would continue to be available at the old rates, that the status quo of transportation would be preserved during investigation of a change. Congress deemed it fair to the carrier and consistent with due process to require the carrier to postpone a change in rates which it had previously established for itself. Since a carrier is not permitted to transport oil by pipeline in interstate commerce unless it has an effective tariff on file, 49 U.S.C. § 6(7), Congress contemplated suspension only where the carrier could continue its prior rates and services, not where the result would be total blockage of service by a newly constructed railroad or oil pipeline.

A. The Legislative History and Purpose of the Mann-Elkins Act Confirm That Original Rates Were Not To Be Suspended.

As it stood after amendment by the Hepburn Act of 1906,[21] the Interstate Commerce Act contemplated two types of filings: the general filing of all tariffs under section 6(1), and the filing of changed tariffs, thirty days before the effective date of such change, under section 6(3).[22] Those who sought enactment of the legislation which became the Mann-Elkins Act linked the proposed suspension power to the category of changed tariffs which had been established in 1906 by the Hepburn Act. Thus, President Taft, in a message to Congress, pointed out that there was a defect in the Hepburn Act's procedure since "[u]nder the existing law the commission may not investigate an increase in rates

21. Ch. 3591, § 2, 34 Stat. 584, 586.

22. References to a "section" or "sections" are to provisions in Part I of the Interstate Commerce Act, 49 U.S.C. §§ 1-27.

until after it shall have become effective; and although one or more carriers may file with the commission a proposed increase in rates or change in classifications, or other alteration of the existing rates or classifications, to become effective at the expiration of thirty days from such filing, no proceeding can be taken to investigate the reasonableness of such proposed change until after it becomes operative." 45 Cong. Rec. 462 (1910), *reprinted in* H.R. Rep. No. 923, 61st Cong., 2d Sess. 3-4 (1910). Accordingly, the President advocated legislation to permit the commencement of such an investigation before the proposed change took effect and also to give the Commission a power to postpone the effective date of the change while the investigation proceeded. The language of the first sentence of section 15(7), which defines the tariffs which may be suspended, was drafted by the Taft Administration (*see* H.R. Rep. No. 923, 61st Cong., 2d Sess. 5 (1910)) and remains substantially unchanged today:

> Whenever there shall be filed with the commission any schedule stating a *new* individual or joint *rate,* fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice. . . . 36 Stat. 552 (Emphasis added). *Compare* 49 U.S.C. § 15(7).

The reference to a "new . . . rate" undoubtedly has the same meaning in the statute as it possessed in the speeches in which President Taft proposed the legislation. As he explained in Des Moines on September 20, 1909:

> "Under the interstate-commerce law [as modified by the Hepburn Act] a new rate classification is to be filed with the commission. It is proposed now to authorize the commission to postpone the date that such new rate classification is to take effect. This introduces a new element into the act by placing the railroad company in the situation when it proposes to make a change in the rate that it should be prepared to show to the commission affirmatively that *the change to the new rate is justified.*"
> *Reprinted in* 45 CONG. REC. 6789 (1910) (Emphasis added).

The reference in the Mann-Elkins Act to "any schedule stating a new . . . rate" is also directly related to the provision in section 6(3) which required the "printing of new schedules" whenever any tariff was changed.[23] Congress, as well as the President, understood that relationship. As Senator La Follette explained, "[t]he Hepburn law provided that all new rates should be filed, . . . the [Mann-Elkins] bill as reported provides that the Commission shall have but sixty days' time in which to examine these rates before they go into effect, . . . suspending the rate." 45 CONG. REC. 6893 (1910).[24] The Committee reports which

23. Added in § 2 of the Hepburn Act of 1906, ch. 3591, § 2, 34 Stat. 584, 586.

24. As ultimately enacted, the bill authorized suspension, not for 60 days, but for 120 days, followed by a further suspension of as much as six months, if the Commission had not completed its investigation, 36 Stat. 552. In 1917, Congress provided that until January 1, 1920 the Commission could suspend increased rates or fares for an indefinite period. Act of August 9, 1917, ch. 50, § 4, 40 Stat. 270, 272. Congress shortened the suspension period to 150 days in the Transportation Act of 1920 (the Esch-Cummins Act), ch. 91, § 418, 41 Stat. 456, 486-87. In 1927 Congress lengthened the suspension period to the present seven-month maximum. Act of March 4, 1927, ch. 510, § 2, 44 Stat. 1446, 1447-48.

accompanied the administration bill[25] also made clear that the suspension power concerned "a proposed increase in rates, or change in classification." S. REP. No. 355, 61st Cong., 2d Sess. 9 (1910). Suspension was to be a "power to suspend changes in rates pending a hearing upon the propriety of the change." *Id.*, minority statement (Pt. 2) at 9. In hearings before the House Committee on Interstate and Foreign Commerce, ICC Chairman Knapp rejected any suggestion that suspension, as provided in the bill, would give the Commission "the power to initiate rates," pointing out that "the rate is already initiated and there, and has been put in by the railroad." When Representative Richardson suggested that a carrier-initiated rate "has not gone into effect" at the time the Commission exercises its suspension power, Chairman Knapp replied "[o]h, yes. They had a rate before they filed the new tariff."[26]

It was the existence of a presumptively reasonable "old" rate, affording a basis for comparison with the new rate, which made possible a rapid, practical-minded decision whether to suspend, without taking evidence as to the needs of the business.[27] It was the fact that service to the public could continue at a rate previously fixed by the carrier which was thought to make suspension legislation fair both to the carriers and to the public. As the Commission had stated in its annual report for 1908, urging adoption of such

25. H.R. 17536 (The Townsend Bill), S.6737, 61st Cong., 2d Sess. (1910). For the suspension provision as adopted by each chamber see *Comparison of Railroad Commerce Bills,* S. Doc. No. 606, 61st Cong., 2d Sess. at 25-27 (1910).

26. *On Bills Affecting Interstate Commerce: Hearings Before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d Sess. 1211 (1910).

27. *See* 3-B I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, 463 (1931). "Probably the most important fact in most rate situations is the prevailing position of the charge. Existing rates and their relationships provide a starting-point with reference to which evidence can be considered and which possess a momentum tending to further their continuance."

legislation, "[n]o carrier should be required to reduce its rates without a fair hearing; neither, in our opinion, should the public be required to pay advanced rates without opportunity for a fair hearing." 22 I.C.C. ANN. REP. 11 (1908).[28]

The concern for fairness was widely reflected in Congress. Representative Mann, sponsor of the bill, emphasized that "when the railroad company then files this schedule of rates proposing to increase the rates, we say it is a reasonable presumption that the rate which has existed, possibly for a long time—but whether for long or short, the one in existence—is a fair rate, and should remain in force until the commission has had an opportunity to give some investigation to the subject. That seems to be fair to the railroad company and fair to the shipper." 45 CONG. REC. 4713 (1910). Congress also linked the carrier's right to maintain an existing rate to the due process requirements of the Constitution.[29]

The suspension period which Congress ultimately authorized in 1910 was a maximum of "eleven months" (45 CONG. REC. 6916 (remarks of Senator Jones)), including, as it did, the original thirty-day notice period required by the Hepburn Act, a four-month ("120 days") suspension period, and a further six-month suspension period, if necessary to complete the Commission hearing. It would have been a grave matter to authorize the Commission utterly to

28. *See* 1 I. SHARFMAN, *supra* note 27, at 59-60.

29. *See, e.g.*, 45 CONG. REC. 6504 (1910) ("the railroad having once established a rate, it must be accepted as at least high enough not to confiscate its property, and, I think, high enough to afford a just compensation for its service") (remarks of Senator Bailey); *id.* at 6510 ("if Congress has the power . . . to prescribe a schedule of rates . . . then it may declare that the railways shall not charge more than the rates which are now lawfully in existence") (Senator Cummins); *id.* at 6509 (Senator Crawford); *id.* at 6787 ("we say, as to that which you have fixed as a reasonable compensation for your services, there shall be no change until a tribunal shall have a practicable and a reasonable time within which to determine it") (Senator Borah).

deprive a carrier of the right to operate a new railroad or pipeline during so long a period, and none in Congress suggested that the Mann-Elkins bill would have such a result.[30] In emphasizing the fairness of requiring maintenance of existing rates, Congress manifested an "unwillingness to enact legislation that may be subject . . . to constitutional challenge" (*United States* v. *Witkovich*, 353 U.S. 194, 201 (1957)), and courts should not adopt a statutory construction which might conflict with constitutional policy. *See Blanchette* v. *Connecticut General Insurance Corps.*, 419 U.S. 102, 134 (1974). If the Commission could suspend the original rate of a new railroad or oil pipeline, leaving it with no rate at all and forbidding it to use its property in interstate commerce, then every such suspension would raise constitutional issues. Congress thought it had obviated constitutional issues by requiring maintenance of an existing rate.[31]

In enacting section 15(7), Congress sought "a careful accommodation of the various interests involved" (*United States* v. *Students Challenging Regulatory Agency Pro-*

30. Indeed, Congress expressed no concern about new railroads or pipelines commencing operations at high prices. The mischief to be remedied was the occurrence of abrupt changes in existing rate structures, and the fact that section 6(3) of the Interstate Commerce Act, as amended by the Hepburn Act, did not authorize investigation of such changes until after they had gone into effect. The statutory purpose accordingly limits the meaning of ambiguous terms. *See United States* v. *Champlin Refining Co.*, 341 U.S. 290, 297 (1951) ("[t]he statute cannot be divorced . . . from the evil which Congress sought to correct and prevent"); *Hamilton* v. *Rathbone*, 175 U.S. 414, 419 (1899); *Smith* v. *Townsend*, 148 U.S. 490, 494 (1893).

The rules of statutory construction, with which Congress was familiar in 1910, also required express language to deprive a carrier of its common law rights. *See Shaw* v. *North Pennsylvania R.R.*, 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import"); *ICC* v. *Northern Pacific R.R.*, 216 U.S. 538, 544 (1910). For the carrier's common law right to initiate rates, see, for example, *ICC* v. *Chicago Great Western Ry.*, 209 U.S. 108, 119 (1908).

31. In the instant cases the record provides no means to calculate the loss that would be incurred if a pipeline, constructed at a cost of some $9 billion, were required to remain idle for seven months. The carriers attempted to minimize those losses by commencing operations

cedures ("SCRAP I") 412 U.S. 669, 697 (1973)), "allocat-[ing] the benefit and harm of suspension." *Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade,* 412 U.S. 800, 823 (1973). The rulings below "would disturb this careful balance of interests." 412 U.S. at 697. If the carrier incurs loss during a lawful suspension period, it is not allowed to pass on that loss to subsequent users of the regulated service.[32] So far as the public was concerned, Congress may well have thought that commencement of service on a new line at possibly "high" rates was preferable to blockage of all service, particularly since the Hepburn Act held out the promise of full reparations, plus interest and attorney's fees, once the Commission had held its full hearing and determined whether the carrier's rate was indeed excessive.

B. In 1920, Congress placed an "Authoritative Gloss" on Section 15(7), Confirming Its Intention That Only a "Proposed Change" Could Be Suspended.

When Congress amended section 15(7) in 1920,[33] it placed an "authoritative gloss"[34] on the 1910 definition of the

at the interim rates fixed by the Commission, but uncontroverted evidence indicated that such operation resulted in net loss. 650a-52a.

The lack of procedural safeguards contributed to Commission error in assuming a throughput of 1.2 million barrels per day for purposes of ascertaining an interim rate, when the data before the Commission indicated that throughput during a 7 month start-up period would necessarily be much lower. In fact, average throughput is little more than half that rate. *See* note 14, *supra* at 10. The carriers cannot ship enough oil to earn even the revenues to which the ICC found they were entitled. *See* 578a-93a.

32. *See Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.,* 284 U.S. 370, 387-388 (1932); *FPC* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 152 (1962); *Hope Nautral Gas Co.* v. *FPC,* 196 F.2d 803 (4th Cir. 1952).

33. Transportation Act of 1920 (Esch-Cummins Act), ch. 91, § 418, 41 Stat. 486.

34. For examples of an "authoritative gloss," see *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 501 (1968); *Utah Junk Co.* v. Porter, 328 U.S. 39, 42 (1946); *United States* v. *Florida,* 363 U.S. 121, 132 (1960) (Frankfurter, J., concurring); *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 685 (1954) (Frankfurter, J., concurring).

tariffs which might be suspended. While the 1910 Act had referred to "any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge," the 1920 amendment referred to the entire enumeration as "the proposed change," providing that "[i]f the proceeding has not been concluded and an order made [within the period of suspension], *the proposed change of rate, fare, charge, classification, regulation or practice* shall go into effect at the end of such period. . . ." Transportation Act of 1920 (Esch-Cummins Act), ch. 91, § 418, 41 Stat. 456, 486-87 (emphasis added).[35] In other words, Congress understood the statutory reference to the filing of any "new" rate, fare, charge, classification, regulation or practice to be the same as "the proposed change of [any] rate, fare, charge, classification, regulation or practice." When Congress made that understanding express by statutory amendment in 1920, it placed an authoritative gloss upon the statute—a gloss which is of course consistent with the intention expressed in the legislative history of the 1910 enactment. *See Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 380-81 & n.8 (1969) (subsequent amendment of § 315 of the Federal Communications Act showed Congress' intention as to requirements of that section). "[I]f it can be gathered from a subsequent statute *in pari materia,* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman,* 44 U.S. (3 How.) 556, 564 (1845). *See N.L.R.B.* v. *Bell Aerospace Co. Divi-*

35. In the quoted clause, Congress merely restated the substance of prior law, but it went on to enact a special accounting and refund provision, discussed in Point IV *infra,* which is applicable when increased rates go into effect at the end of a suspension period, before the completion of a hearing. The 1920 amendment shortened the maximum suspension period to five months, and the special refund provision was intended to give a countervailing protection to shippers.

sion of Textron, Inc., 416 U.S. 267, 275 (1974) ("significant weight"); *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-44 (1972) ("great weight").[36]

C. Agency Practice Confirms that Original Tariffs May Not Be Suspended.

The Interstate Commerce Commission itself never asked Congress for authority to suspend the original tariffs of new railroads and pipelines.[37] Not until the instant case did the Commission assert that the 1910 enactment had given it such power. Indeed, the Commission indicated in

36. The legislative history of the 1920 enactment indicates the understanding of Congress that the schedules to be suspended were those containing a "proposed change of rate" required to be filed on 30 days notice pursuant to § 6(3). *See* H.R. REP. No. 456, 66th Cong., 1st Sess. at 20-21 (1919). Describing § 15(7) as enacted in 1910, the sponsor of the 1920 amendment (Representative Esch) noted that "where an application for an increase of rates or rate structures is made not less than 30 days are allowed for such notice. The commission, under existing law, can suspend the rates so filed . . ." 58 CONG. REC. 8317 (1919). *See also* 59 CONG. REC. 143 (1919) (Sen. Cummins) (linking operation of § 6(3) and § 15(7)). When the 69th Congress altered the period of suspension in 1927 it also appeared to believe that the suspension power had application only where "a carrier wants to change a given rate." 67 CONG. REC.12757 (1926) (remarks of Rep. Newton).

37. In its report for 1909, the Commission had urged that "some method should be provided by which railroads can be prevented from advancing their rates or changing their regulations and practices to the disadvantage of the shipper, pending an investigation into the reasonableness of the proposed change." 23 ICC ANN. REP. 6 (1909). *See also* 21 ICC ANN. REP. 9-10 (1907). In testimony before Congress on behalf of the Commission, Judge Clements had explained that the suspension power "is simply holding that rate then made in statu quo, and when they ask to increase it asking the reason for it. . . . The suspension in this case is simply to hold things where they are until you find out what ought to be done." *On Bills Affecting Interstate Commerce: Hearings before the Comm. on Interstate & Foreign Commerce of the House of Representatives*, 61st Cong., 2d Sess. 1271 (1910). *See* 1 I. SHARFMAN, INTERSTATE COMMERCE COMMISSION 58 (1931).

a 1930 decision that it was "without jurisdiction" to suspend a carrier's original tariff for service on a railway extension not previously served by that carrier. *Restriction in Routing Between Greenwood and Augusta*, 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line Railroad* v. *United States*, 48 F.2d 239, 245 (W.D.S.C. 1931), *aff'd*, 284 U.S. 288 (1932). And as early as 1912 the Commission took note of the inherent unfairness of any suspension that would leave a carrier without any lawful rates in effect. *See In re Wharfage Charges of the Galveston Wharf Co.*, 23 I.C.C. 535, 537 (1912).[38] Current Commission regulations presuppose that "the previous tariff and effective supplements are continued in effect and remain in effect during the period of suspension." 49 C.F.R. § 1300.9(k)(5) (1976).[39]

38. Other Commission decisions are consistent. In *Discontinuance of Inland Stations In New York City*, 173 I.C.C. 727, 729-30 (1931) the full Commission construed § 15(7) as "not limited to increased rates, but . . . [to] any tariffs filed by carriers changing their present practices or rates." *See Maximum Rate Provision, Ocean-Rail to Southwest*, 258 I.C.C. 63, 64-65 (1944); *Salt from Louisiana Mines to Chicago*, 69 I.C.C. 312, 313 (1922) (Sec. 15(7) gives authority over any " 'new' rate, whether it be increased or decreased.").

39. It is true that the Commission has developed a special category of "initial rates," a term which it uses to refer, not to original rates filed under § 6(1), but to rates for somewhat novel services, which themselves constitute a "new . . . classification" or "new . . . practice" by the carrier, and which must be filed under § 6(3). This special category has developed because, as enacted in 1910, § 15(7) placed upon the carrier "the burden of proof to show that the increased rate or proposed increased rate is just and reasonable." 36 Stat. 552. Carriers who proposed to decrease their rates or introduce a "new . . . classification" or a "new . . . practice," as by offering a somewhat novel service, did not have to sustain this burden of proof, since it was the "classification" or "practice" that was "new," while the rate itself was "initial," not "changed." In 1940, Congress amended the statute to place on the carrier the burden of justifying any "changed rate," but the carrier is not required to bear the burden of justifying a changed classification or practice. Transportation Act of 1940, ch. 722, § 10(c), 54 Stat. 912. A review of these burden of proof cases, in which the Commission has sought to define its category of initial "rates," confirms that they actually concern changes in prior classifications or practices. *See, e.g., Cotton from New Orleans*, 49 I.C.C. 751 (1918) (carrier changed former practice and filed separate rate

The Federal Power Commission, which administers suspension provisions of the Natural Gas Act and the Federal Power Act (15 U.S.C. § 717c(e) and 16 U.S.C. § 824d(e)) which are phrased in terms virtually identical to those of section 15(7), established by rule thirty years ago that it is without authority to suspend "initial rates" (18 C.F.R. §§ 2.4(d), 2.52 (1977)), and that commission uses the term to mean original rates, such as those of a natural gas company commencing interstate operations under a certificate of public convenience and necessity, which do not "supersede, supplement, cancel or otherwise change" schedules previously on file. 18 C.F.R. § 35.1(b) (1977). *See Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, 146 (1960) ("when a producer commences interstate sales from a particular field . . . there are by definition no existing rates, and accordingly [the suspension provisions], which are bottomed on delaying the effectiveness of, and suspending, changes, are not relevant").[40]

D. If Congress Has Authorized Prior Review of Original Rates In Other Statutes Regulating Other Carriers, This Is Only As An Adjunct of Agency Licensing Power.

Although the Court of Appeals could find no "insight" in the legislative history of section 15(7) (756a), it nevertheless thought it significant that, after enactment of the

for delivery at a city, rates to which were previously ascertained as a proportion of the rates to a point beyond); *Rail-Water, Grain In Bulk, Mo., Ill. and Ind. to Buffalo,* 321 I.C.C. 564 (1963) (carriers with prior individual tariffs filed joint "initial tariff" for new combined service); *Animal Feed from Mississippi and Tennessee to Midwest and Southwest,* 316 I.C.C. 94 (1962) (established motor carrier which had been transporting fertilizer filed "initial rates" for carriage of feed on same route); *Bituminous Coal via Motor-Rail from Lynnville, Ind., to Chicago, Ill.,* 313 I.C.C. 573 (1961) (established carriers filed "initial" joint rate for through transport of coal).

40. *See also FPC* v. *Hunt,* 376 U.S. 515 (1964); *Bel Oil Corp.* v. *FPC,* 255 F.2d 548, 554 (5th Cir.), *cert. denied,* 358 U.S. 804 (1958); *Phillips Petroleum Co.* v. *FPC,* 258 F.2d 906, 917 (10th Cir. 1958).

Mann-Elkins Act, subsequent Congresses which enacted similar suspension provisions had sometimes taken care to provide by specific language that original tariffs were not subject to suspension, and concluded that the absence of such a negative proviso in the Mann-Elkins Act meant that Congress had authorized the Commission to suspend the original rates of new railroads and pipelines. 756a-57a. But the absence of such a negative proviso in section 4 of the Natural Gas Act (15 U.S.C. § 717c(e)) and section 205 of the Federal Power Act (16 U.S.C. § 824d(e)) has never been thought to imply that Congress wished to authorize suspension of original rates under those Acts. *See* discussion *supra* at 28. And the latter-day history of the other provisions, in which Congress did insert such negative provisos, merely shows that when Congress has focused its attention on the question whether the suspension power might be used to block service by a new entrant, Congress has been concerned to ensure that it should not be so used. *See, e.g.,* Federal Aviation Act § 1002, 49 U.S.C. § 1482(g). The fact that subsequent Congresses sought to avert such an interpretation in connection with other statutes provides no basis for inferring that Congress intended such an interpretation in 1910.[41]

In the case of motor carriers, water carriers and freight forwarders, Congress specifically barred the suspension of original rates only when those rates were filed prior to certain cut-off dates, and therefore it may be contended that, by negative implication, those statutes authorize the Interstate Commerce Commission to suspend the original rates of those other carriers if filed after those dates. But the dates in question correspond to the dates after which new entry in those industries is conditioned on the Commission's

41. *See United States* v. *Price,* 361 U.S. 304, 313 (1960); *Rainwater* v. *United States,* 356 U.S. 590, 593 (1958); *Fogarty* v. *United States,* 340 U.S. 8, 13-14 (1950). The legal views of a subsequent Congress become significant only if that Congress amends the statute in question so as to elevate such views to the status of positive law, as Congress did in amending § 15(7) in 1920. *See* Point I. B., *supra.*

prior grant of a certificate of public convenience and necessity. And any intention of Congress not to forbid suspension of original rates after those dates would reflect no more than a desire to give the Commission plenary licensing authority.[42] Prior to granting such a certificate the agency reviews and approves the new entrant's original rates. *See Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959); *Federal Power Commission* v. *Sunray DX Oil Co.,* 391 U.S. 9 (1968).[43]

In 1910 Congress was well aware of state legislation in New York and Wisconsin which authorized regulatory bodies to issue or withhold a certificate of public convenience and necessity, and it considered granting the Interstate Commerce Commission the authority "to determine whether a line shall be constructed".[44] Congress ultimately enacted such legislation in respect of new railroad lines in 1920. Transportation Act of 1920, ch. 91, § 402, 41 Stat. 477. But it has never authorized the Commission to grant

42. *See* 49 U.S.C. §§ 316(g) and 306(a)(1) (motor carriers); 907(g), (i) and 909(a) (water carriers); 1006(e) and 1010(a)(1) (freight forwarders). The same rationale explains the recent decision of Congress to authorize suspension of original rates of carriers under the Federal Communications Act, 47 U.S.C. § 204, since the FCC already had power to block commencement of operations under that act by withholding a certificate of public convenience and necessity, 47 U.S.C. § 214.

43. Since the Interstate Commerce Commission has already reviewed the proposed original rate of a motor carrier, water carrier or freight forwarder at the time it issues a certificate of public convenience and necessity (*see, e.g., West Coast Bus Lines, Ltd., Common Carrier Application,* 41 M.C.C. 269, 272, 285, 291 (1942), *aff'd sub nom. North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (N.D. Calif.), *aff'd in part and dismissed in part,* 323 U.S. 668 (1944)), it would be inconsistent for it then to "suspend" that rate. Congress probably did not intend to authorize the Commission to use its licensing and suspension powers in an inconsistent manner. The principal purpose of the "grandfather" clauses in these other statutes may have been to assure that motor carriers, water carriers and freight forwarders, all of whom were being brought for the first time under federal jurisdiction, could "change" their existing tariffs so as to fit them for filing under the required federal format, but not run the risk of suspension as a result of any formal change in practices or classifications.

44. *On Bills Affecting Interstate Commerce: Hearings before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d Sess. 581 (1910) (Remarks of Mr. Esch). *See id.* at 1090 (Mr. Barrett).

a certificate of public convenience and necessity in respect of new oil pipelines.[45] Construction of the Trans-Alaska Pipeline System was authorized by Congress itself (43 U.S.C. §§ 1651-55), and the vast investment in that pipeline was made in reliance upon that authorization and upon the general rule of the Interstate Commerce Act that rates are to be fixed in the first instance by the carrier, subject to revision by the Commission only after full hearing and upon a record which permits judicial review. *Aberdeen & Rockfish Railroad* v. *Students Challenging Regulatory Agency Procedures* ("SCRAP II"), 422 U.S. 289, 311 (1975). *See Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944). Congress could not have intended that suspension should be used as a power to license railroads and oil pipelines since the investor's decision to construct such lines had to be made and carried out before any question of suspending an original tariff could arise.[46] Under the Congressional plan, even where an agency is authorized to grant or withhold a license, its decision must be supported by substantial evidence, upon a record which allows judicial review. *E.g., Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962); *Interstate Commerce Commission* v. *J-T Transport Co.,* 368 U.S. 81, 93 (1961). *See Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281 (1974).

45. The absence of such a requirement implies that Congress thought it unnecessary to require prior review of an oil pipeline's original rate, particularly since reparations were available if the rate was ultimately found to be excessive. The Natural Gas Act contained no reparations provision (*FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944)) and accordingly it was essential, under the plan of that act, that the Federal Power Commission review the rates of a natural gas pipeline before issuing a certificate of public convenience and necessity. *Atlantic Refining Co.* v. *Public Service Commission of N.Y.* ("*CATCO*") 360 U.S. 378 (1959). *See United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223 (1965).

46. Agency jurisdiction over a common carrier by oil pipeline arises only after actual commencement of transportation operations. 49 U.S.C. § 1(1). *See Schmitt* v. *War Emergency Pipelines, Inc.,* 175 F.2d 335 (8th Cir.), *cert. denied,* 338 U.S. 869 (1949); *Pennsylvania R.R.* v. *Public Utility Commission of Ohio,* 298 U.S. 170 (1936); *Southern Ry.* v. *Prescott,* 240 U.S. 632 (1916); *Southern Ry.* v. *Reid,* 222 U.S. 424 (1912).

II.

THE SUSPENSION POWER MAY BE EXERCISED ONLY IN ACCORDANCE WITH THE PURPOSE OF CONGRESS, TO ENSURE MAINTENANCE OF THE STATUS QUO PENDING INVESTIGATION OF NEW RATES.

Even if the original rate of a new oil pipeline or railroad were regarded as a "new" rate which could be suspended under the statute, the Commission is authorized to suspend only to effectuate the statutory purpose, *i.e.*, to maintain the status quo of transportation pending an investigation. The Commission itself has always considered the suspension power as "an emergency measure to preserve the *status quo* until determination can be had as to whether certain proposed acts are legal." *Vulcan Detinning Co.* v. *New York Central Railroad,* 203 I.C.C. 260, 261 (1934). *See Class Rates Between Stations in Louisiana,* 33 I.C.C. 302, 303 (1915). This is the position that the Commission has taken before the courts. *See Ferguson-Steere Motor Co.* v. *United States,* 126 F. Supp. 588, 590 (N.D. Tex. 1954) ("serves only as an interim action, to preserve the status quo while the Commission is making the investigation"). And this is the intended purpose of suspension as Commission representatives explained it to Congress before enactment. Suspension was to be "simply holding that rate then made in statu quo, and when they ask to increase it asking for the reason for it . . . simply to hold things where they are until you find out what ought to be done."[47] The purpose of suspension under related statutes is of course the same.[48]

47. Testimony on behalf of the Commission by Judge Clements, *On Bills Affecting Interstate Commerce: Hearings before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d Sess. 1271 (1910).

48. *See Phillips Petroleum Co.* v. *FPC,* 227 F.2d 470, 474 (10th Cir. 1955) ("[t]he obvious purpose for granting suspension powers to the [Federal Power] Commission was to provide a status quo of five months during which the Commission could investigate the reasonableness of the proposed new rate schedule"); *Hope Natural Gas Co.* v. *FPC,* 196 F.2d 803, 809 (4th Cir. 1952) ("maintenance of the status quo"). *See Sunray Mid-Continent Oil Co.* v. *FPC,* 364 U.S. 137, 146 (1960) ("bottomed on delaying the effectiveness of, and suspending, changes").

The essential prerequisite to any suspension is a finding, often implicit rather than express, that it is preferable in the public interest that the status quo be maintained pending an investigation rather than that the proposed change take effect at once.[49]

In the instant cases, the Commission found, without taking evidence, "that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates" (626a), but it did not find that it was preferable in the public interest to defer commencement of service through the pipeline rather than to allow service at the rates fixed by the carriers. Indeed, the Commission held just the opposite, stating expressly that it would be "contrary to the interests of all concerned" to postpone commencement of service on the Trans Alaska Pipeline. 629a. But the Commission suspended the tariffs anyway, on the assumption that it could thus coerce the carriers into filing different tariffs at rates fixed by itself.

49. The Mann-Elkins Act requires that the Commission provide "a statement in writing of the reasons for its suspension" and the Commission has often limited itself to a statement that "the rights and interests of the public would be injuriously affected" by the change. *See Ferguson-Steere Motor Co.* v. *United States,* 126 F. Supp. 588 (N.D. Tex. 1954). The Commission has sometimes gone further. *See, e.g., In re The Request for Suspension of Reduced Rates on Packing-House Products And Fresh Meats From Fort Worth, Tex. to Mississippi River Crossings and Points East Thereof,* 21 I.C.C. 68, 70 (1911) ("[a] prima facie case clearly and affirmatively persuasive should be presented before the power to suspend is exercised"); *Board of Trade of Chicago* v. *Illinois Central R.R.,* 26 I.C.C. 545, 552 (1913). *Compare Amarillo-Borger Express, Inc.* v. *United States,* 138 F. Supp. 411, 414 (N.D. Tex. 1956), *vacated as moot,* 352 U.S. 1028 (1957) ("There is reason to believe that [the proposed changes] . . . would be unjust and unreasonable . . .").

The Court of Appeals reasoned that the Commission had absolute discretion whether to suspend and that, as a "valid corollary" of such power, it might impose such conditions as it pleased. But Congress could not have intended to confer absolute discretion since it required the Commission to give a written statement of the reasons for its action.[50]

There can be no doubt that a suspension decision which is, on its face, based on unlawful reasons can be reviewed and reversed, for the legislative history provides no "clear and convincing evidence" that Congress wished to cut off the right of review. *See, e.g., Dunlop* v. *Bachowski,* 421 U.S. 560, 567 (1975). The decisions of the District of

50. *See* 45 CONG. REC. 6500 (1910) ("it must be true that the Commission shall have some reason for suspending these rates, because this section . . . requires the Commission to state to the carrier or carriers the reason for suspending the rate") (Sen. Cummins). ". . . [T]he authority they have is to ascertain the fact where Congress has declared that a certain fact shall be the guide. . . . We can not confer upon the Interstate Commerce Commission legislative authority except for the purpose of carrying out the administrative determination of the fact which we have declared shall be the guide." *On Bills Affecting Interstate Commerce: Hearings Before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d Sess. 440 (remarks of Rep. Mann).

The cases rejecting judicial review of suspension rulings have usually concerned a decision *not* to suspend, holding only that courts have no injunctive power to defer rate changes. *See, e.g., SCRAP I,* 412 U.S. 669, 691 (1973) (Congress "deliberately extinguished judicial power to grant [injunctive relief]"); *Arrow Transportation Co.* v. *Southern Ry.,* 372 U.S. 658, 669 (1963) ("[o]ur holding today . . . means only that the injunction remedy is not available . . . ."). A decision not to suspend need not be supported by stated reasons, and such a decision is unlikely to result in irreparable harm since the shipper retains his remedy by way of reparations. But the Court has specifically left open the question whether the Commission's exercise of the suspension power may itself be subject to judicial review. *SCRAP I,* 412 U.S. 669, 698 n.22 (1973). The sounder view in the lower courts would permit review of suspension orders for gross abuse of discretion. *See, e.g., Naph-Sol Refining Co.* v. *United States,* 269 F. Supp. 530 (W.D. Mich. 1967) (three-judge court); *Long Island R.R.* v. *United States,* 193 F. Supp. 795 (E.D.N.Y. 1961) (three-judge court, per Friendly, J.); *Freeport Sulphur Co.* v. *United States,* 199 F. Supp. 913 (S.D.N.Y. 1961). This Court remanded for such a review in *United States* v. *Chesapeake & Ohio Ry.,* 426 U.S. 500 (1976).

Columbia Circuit have recognized a distinction between *bona fide* suspensions consistent with the purpose of Congress and " 'sham' suspensions aimed at coercing behavior rather than merely preserving the status quo pending investigation." *Continental Airlines, Inc.* v. *Civil Aeronautics Board,* 522 F.2d 107, 129 (D.C. Cir. 1975). *See Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 543 F.2d 247 (D.C. Cir. 1976); *Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970). *See also American Telephone & Telegraph Co.* v. *Federal Communications Commission,* 487 F.2d 865, 874-75 (2d Cir. 1973). Commission action in the instant case was a clear example of such a "sham" suspension.

In *United States* v. *Chesapeake & Ohio Railway* ("Chessie"), 426 U.S. 560 (1976), this Court reviewed and upheld conditions which had originally been proposed by the carriers. These conditions were held to be "carefully tailored" to the asserted needs of the carriers, which the statute required them to explain in supporting the burden of proof that increased rates were justified. 49 U.S.C. § 15(7). And the Commission had held in that case that it was preferable to defer any increase rather than to permit the carriers to raise the rates without any assurance that the increment would be spent in accordance with the asserted need.[51] Having made that determination, the Commission was free to intimate that "a more measured course . . ."—acceptance of conditions that would ensure expenditure of the funds as represented by the carriers—would make the increase preferable to the status quo.[52] In the instant case,

51. " '[I]f the schedules were permitted to become effective as filed and without conditions designed to promote service improvements, the increases proposed would be unjust and unreasonable and contrary to the dictates of the national transportation policy. . . .' " 426 U.S. at 503.

52. *Compare Port of New York Authority* v. *United States,* 451 F.2d 783 (2d Cir. 1971), in which the Commission held that maintenance of service at existing rates was preferable to immediate inauguration of the higher, new rates, but intimated that maintenance of the status quo would not be insisted upon if the carrier filed a tariff providing for more modest increases.

however, the Commission made no finding that it would be preferable to defer operation of the Trans Alaska Pipeline rather than to commence operation at the carriers' original rates. And instead of suggesting an alternative that was "carefully tailored" to allow some improvement over a rate previously initiated by the carriers, the Commission fashioned its own rates, rough-hewn out of whole cloth. It compelled the carriers to commence operations at rates well below any they had ever endorsed.

The Commission asserted in the instant case that if it were required to choose between maintenance of the status quo and adoption of the change in service as proposed by the carrier, the suspension power "would be a substantially less satisfactory tool for serving the public interest." 629a. But this is the choice that the statute requires when a suspension decision is made. Suspension would not be a "satisfactory tool" at all if the Commission were free to disregard the choice between carrier-initiated rates and status quo, and to impose, without evidentiary basis, ill-considered rates of its own, which may result, as here, in irretrievable loss and damage to the national transportation system.

III.

THE SUSPENSION POWER MAY NOT BE USED TO CIRCUMVENT THE PROCEDURAL SAFEGUARDS TO WHICH CONGRESS HAS SUBJECTED THE COMMISSION'S RATE MAKING POWER.

In the instant case the Commission did not merely abuse the suspension power by exercising it otherwise than to preserve the status quo. It went further, using the suspension power to compel adoption of interim rates which it fixed for itself in a summary procedure, without taking evidence, in total disregard of the procedural requirements for ratemaking which Congress laid down in the Hepburn Act. In so doing, the Commission deviated from the Con-

gressional plan, which contemplates that carriers shall be allowed to operate either at rates freely chosen by themselves or at rates fixed by the Commission after full hearing, with due process of law.

The power to prescribe rates has traditionally been regarded as "a power of supreme delicacy and importance," *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway,* 167 U.S. 479, 505-06 (1897) ("Maximum Rate Case"). The Interstate Commerce Act has never deprived the carrier of the common law right "to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise." *United States* v. *Illinois Central Railroad,* 263 U.S. 515, 522 (1924). *Accord, Aberdeen & Rockfish Railroad* v. *Students Challenging Regulatory Agency Procedures* ("SCRAP II"), 422 U.S. 289, 311 (1975); *United States* v. *Students Challenging Regulatory Agency Procedures* ("SCRAP I"), 412 U.S. 669, 672 (1973).

Under the Interstate Commerce Act, the Commission's power to set rates arises only when rates are examined and determined to be unlawful "after full hearing." 49 U.S.C. § 15(1). As early as 1887 Congress authorized the Commission to determine whether rates established by carriers were excessive, and to require payment of reparations.[53] But when it was contended, in the *Maximum Rate Case,* that the power to determine whether rates were excessive necessarily "implied" a power to fix the rates that would be acceptable for the future, this Court rejected any such notion:

> "The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative

53. Act to Regulate Commerce, ch. 104, §§ 1, 8, 24 Stat. 379, 382 (1887).

> mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication."
> 167 U.S. at 494-95.

The Court emphasized that:

> "The power to prescribe . . . rates . . . is a legislative and not an administrative or judicial function .... That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language .... Incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act, does not by implication carry to the commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future.... [T]he clear language of § 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increases or reduction may be made . . . specif[ies] the scope and limit of [the commission's] functions in this respect, [and] strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the commission."
> 167 U.S. at 505-06.

Thereafter, upon enactment of the Hepburn Act in 1906, Congress did confer upon the Commission the power to prescribe maximum rates, but only "after full hearing." 49 U.S.C. § 15(1).[54] But when Congress enacted the Mann-Elkins Act in 1910, it did not authorize deviation from the procedures for rate making that it had established in the Hepburn Act.[55] In 1920, when Congress perceived the problems of emerging competition among differing modes of transportation, it authorized the Commission to establish minimum rates as well, but again, only "after full hearing." *Id.*[56]

54. The Hepburn Act of 1906, ch. 3591, § 4, 34 Stat. 584, 589.

55. The Mann-Elkins Act provided that only "after full hearing" may the Commission make, with respect to a suspended rate, "such order in reference to such rate . . . as would be proper in a proceeding initiated after the rate . . . had become effective." This means that the Commission may prescribe a different rate under § 15(7), just as it can under section 15(1).

Congress has never conferred upon the Commission a power to prescribe, without hearing, interim rates to apply during the period that it has suspended carrier-initiated rates. The Commission's assumption of an "implied" power in this case is very much like the assumption of power which this Court condemned in the *Maximum Rate Case,* and Congress adopted the Hepburn and the Mann-Elkins legislation with that decision in mind.

The rule against implicit delegations of important powers was more recently reaffirmed in *Civil Aeronautics Board* v. *Delta Air Lines, Inc.,* 367 U.S. 316 (1961), where the Court held that "the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do.... [The Board] must follow the procedures 'specifically authorized' by Congress and cannot rely on their own notions of implied powers in the enabling act." 367 U.S. at 334.

The procedure Congress has "specifically authorized" with respect to prescription of an oil pipeline carrier's rates is the "full hearing" provided for in Section 15(1).[57] Such a hearing must afford a right to introduce testimony and to be fully apprised of the evidence submitted or to be considered, and an opportunity to conduct discovery and offer evidence by way of explanation or rebuttal. *Interstate*

56. The Transportation Act of 1920, ch. 91, § 418, 41 Stat. 456, 484-85. *See* 49 U.S.C. § 15(1).

57. "The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority . . . operates in a field limited by constitutional rights and legislative requirements. Its duty under [section] . . . 15(1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates . . . has not been changed. . . . In the discharge of its duty, a fair hearing is a fundamental requirement." *Atchison, T. & S.F. Ry.* v. *United States,* 284 U.S. 248, 262 (1932).

Commerce Commission v. *Louisville & Nashville Railroad,* 227 U.S. 88, 91, 93 (1913). In addition, there must be evidence adequate to support pertinent and necessary findings of fact. *Morgan* v. *United States,* 298 U.S. 468, 480 (1936). At a minimum the Commission should be required to provide fair and reasonable procedures which result in a reasoned decision of controverted issues upon a record which permits judicial review. *See Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167-74 (1962); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad,* 294 U.S. 499 (1935).

The power to prescribe rates is an "extraordinary power," and the right to a hearing prior to the exercise of that power is described as an "inexorable safeguard." *Morgan* v. *United States,* 304 U.S. 1, 15 (1938). An administrative agency, as "the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed." *Morgan* v. *United States,* 298 U.S. 468, 479 (1936). And where Congress has required that a full hearing precede a rate prescription, "the granting of that hearing is a prerequisite to the making of a valid order." 298 U.S. at 473.[58]

The Court of Appeals sought to characterize the establishment of the interim rates here at issue, not as rate-making but as a "partial waiver" of a supposed absolute power to forbid the new carriers to conduct operations upon their pipeline. But we have already shown that the Commission had neither arbitrary nor absolute power, but only such power as Congress had given it, to be exercised in accordance with the Congressional purpose. Congress itself had authorized the construction of the pipeline, and under the Constitution it is doubtful indeed that the carriers could have been forbidden to use their property, on arbitrary

58. *See Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U.S. 292, 304 (1937) ("The right to such a hearing is one of 'the rudiments of fair play'. . . ."); *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.,* 302 U.S. 388, 393 (1938).

grounds, for a seven-month period. The necessary and intended effect of the Commission order was to compel the carriers to adopt the interim rates which had been fixed by the Commission, and the Bureau of Investigations and the Antitrust Division went so far as to suggest that the carriers might face criminal prosecution if they did not adopt those rates.[59]

As Circuit Judge Roney observed in dissent, "[t]his is ratemaking. We should not hide from that fact." 762a. In cases of far less blatant coercion, courts have not hesitated to declare that "[a] suspension decision which effectively blackmails the carriers into submitting agency-authorized rates is functionally indistinguishable from an agency order setting those rates and such orders are, of course, judicially reviewable." *Students Challenging Regulatory Agency Procedures* v. *United States,* 346 F. Supp. 189, 197 (D.D.C. 1972), *rev'd on other grounds,* 412 U.S. 669 (1973). And in *Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970), the court held unlawful an agency order in which the board had suspended proposed tariffs but decreed the rates which it would accept, causing the carriers to adopt and file those rates as their own. The District of Columbia Circuit held that "[i]t would be blinking reality to hold, as the Board argues, that the order . . . did no more than suspend and initiate an investigation of the rates proposed by the carriers . . . . The Board did all that it could, short of formally styling its order as rate making, to induce the carriers to adopt the proposed rates." 430 F.2d at 897-98.[60]

59. *See* discussion *supra* at 8-9.

60. The rate which the Board imposed in *Moss* was a "permanent" rate, but the carriers were free to seek to revise it upward at any time. The principle is the same whether the disguised ratemaking results in a "permanent" or "interim" rate, as here. In *Moss* and *Port of New York Authority* v. *United States,* 451 F.2d 783 (2d Cir. 1971), members of the public complained about agency action in telling the carriers what rates would not be suspended. The carriers themselves made no complaint in those cases since the agency allowed them a partial increase over the rates which they had previously fixed for themselves, and they were free to seek further increases.

The Commission's Order and the Fifth Circuit's opinion reflect an approach parallel to that rejected in *Moss*. As in *Moss*, "[i]t would be blinking reality" to conclude that authorization of tariffs at the specified interim rate constitutes anything less than the *de facto* prescription of rates by the Commission without a full and fair hearing.

IV.

THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY IN REQUIRING THE CARRIERS TO UNDERTAKE TO REFUND AMOUNTS COLLECTED IN EXCESS OF THE RATE TO BE PRESCRIBED.

The Commission conditioned the right of the carriers to operate at the interim rates it had prescribed on their undertaking to "refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed by the Interstate Commerce Commission . . . " 638a.[61] Section 15(7) provides that when "a proposed *increased* rate or charge" which was previously suspended goes into effect prior to completion of a Commission investigation, the Commission may order the carrier to account for and refund any portions of "such *increased* rates or charges as by [Commission] decision shall be found not justified." 49 U.S.C. § 15(7).[62] But the statute makes no such special provision for recovery of any portion of an original rate or a decreased rate, such as the interim rates. When the shipper claims reparations in respect of such rates, his rights and remedies are not governed by this special refund provision of section 15(7) but by the other provisions

61. Such undertaking was to remain in effect even after the suspension period, when the carriers' original rates were to take effect pending completion of the Commission's investigation and hearing. 638a.

62. *See* Transportation Act of 1920 (Esch-Cummins Act), ch. 91, § 418, 41 Stat. 456, 486-87.

of the Interstate Commerce Act. *See* 49 U.S.C. §§ 8, 13, 16. It was clear error for the Commission to expand a provision which Congress expressly limited to a narrow class of cases.

The Commission itself had doubts about this aspect of its order. At a closed meeting of the Commission, its General Counsel described the Commission's authority to impose such a requirement in the instant cases as "doubtful", but concluded that "insofar as the refund provision is made a condition of the willingness of the Commission to accept a lower filed rate in the interim, that may get us over that hurdle." Another staff member referred to the refund provision as a "sort of quid pro quo for allowing [the carriers] to have these interim rates." That same staff member then advised the Commission that "[t]he problem with the refund provision is our statutory authority is somewhat questionable. . . . [T]he statute refers to refunds in the case of increased rates. Here you have initial rates, but if we do it as part of allowing interim rates instead of a suspension, I think we're within reasonable limits."[63]

The Court of Appeals also expressed doubt, but it upheld the condition as "a valid corollary to the suspension power, which we lack jurisdiction to review." 761a. It was error, however, to expand a provision which Congress has expressly limited. And it was also error to require the carriers to waive their right to have the amount of any reparations determined in accordance with the procedures established by law. The fallacy in the Court of Appeals' reasoning was its assumption that a power to impose conditions is a lesser power included within the greater power to suspend rates. The imposition of conditions is a distinct exercise of power which must be reviewed and judged on its own merits. *See* Note, *Unconstitutional Conditions*, 73

63. The transcript here quoted is reproduced in relevant part in Appendix B to the Petition for Certiorari of ARCO Pipe Line Co. (No. 77-602). A certified copy of the full transcript has been lodged with the Clerk.

Harv. L. Rev. 1595, 1609 (1960). Such conditions should be set aside where, as here, they plainly conflict with the intent of Congress.

Attempts by legislative bodies to utilize a similar theory as a basis for conditioning the extension of governmental benefits upon the surrender of constitutional rights have been repeatedly rejected by this Court. The doctrine of unconstitutional conditions holds that a "constitutional power cannot be used by way of condition to attain an unconstitutional result." *Western Union Telegraph Co.* v. *Foster,* 247 U.S. 105, 114 (1918).[64] There is no sound reason why these principles should apply with less force to situations in which the agency has sought to compel "voluntary" acceptance of conditions in order to evade statutory, rather than constitutional, limitations upon its authority.

By conditioning the non-suspension of the tariffs upon the inclusion of an unlawful refund provision, the Commission has purported to deprive the carriers of their right to have their liabilities determined and assessed pursuant to the statutory scheme. Under the Act, a carrier is required to pay reparations equal to the amount by which its tariff exceeded the maximum lawful rate for the period of service,

64. *E.g., Graham* v. *Richardson,* 403 U.S. 365 (1971) (conditioning entitlement to welfare benefits on citizenship or residency); *Sherbert* v. *Verner,* 374 U.S. 398 (1963) (conditioning unemployment compensation on agreement infringing on religious beliefs); *Speiser* v. *Randall,* 357 U.S. 513 (1958) (conditioning tax exemption on inhibition of freedom of speech). "This argument is often phrased in syllogistic terms: if the legislature may withhold a particular benefit, it may grant it in a limited form since the greater power of withholding absolutely must necessarily include the lesser power of granting with restrictions." 73 HARV. L. REV. at 1595. *E.g., Terral* v. *Burke Construction Co.,* 257 U.S. 529 (1922) (state may not condition right to do business upon acceptance of unconstitutional conditions).

together with interest and, in an appropriate case, attorney's fees. 49 U.S.C. § 8. The Commission order here at issue, however, required the carriers to waive their rights to have their liabilities determined under those criteria, and to undertake instead to "refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed by the Interstate Commerce Commission . . ." 636a.

While it is possible that any rate which may subsequently be prescribed for the future will bear a close relationship to the maximum rate that would have been lawful in prior periods, it is well established that the two need not be the same. "[A]warding reparation for the past and fixing rates for the future involve the determination of matters essentially different. . . . One is made by the Commission in its *quasi*-judicial capacity to measure past injuries sustained by a private shipper; the other, in its *quasi*-legislative capacity, to prevent future injury to the public." *Baer Bros.* v. *Denver & Rio Grande Railroad,* 233 U.S. 479, 486 (1914). *See Cattle Raisers' Association* v. *Chicago, Burlington & Quincy Railroad,* 10 I.C.C. 83, 89-90 (1904). To say that one rate shall apply for the future is not to say that no higher rate could have been lawful for the past.[65]

If the Commission did ultimately condemn the carriers' rates in this case and undertook to prescribe the rates for the pipeline, no doubt such rates would be based on the volume of oil expected to be transported in the future. The

65. "Where the question of what is the reasonable rate for the future, or what would have been the reasonable rate for the past, is a close one on the record, and since in either case the exact figure of reasonableness is not demonstrable and must rest upon judgment and conscience enlightened by all the facts, circumstances and conditions, we may in many cases be reasonably well satisfied as to what we should do for the future, while hesitating to apply to past transactions as a basis for reparations the rate fixed for the future, on account of the closeness of the question and the impossibility of demonstration as to what is exactly right . . ." *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. R.,* 51 I.C.C. 635, 640-41 (1918).

carriers would be entitled to argue that the same rate was not necessarily the maximum lawful rate at the time the pipeline was commencing operations, since special circumstances then prevailing made transport costly and uneconomical. And the carriers should be allowed a due process decision of that claim, in accordance with the procedures prescribed by statute.

Conclusion

In authorizing construction of the Trans Alaska Pipeline System, Congress intended that those who undertook that task should be allowed to operate the pipeline in accordance with the regulatory plan of the Interstate Commerce Act, at rates fixed either by the carriers themselves or by government agency, after full hearing, under the procedures of the Act. If private investment is to retain a role in our mixed economy in the accomplishment of such projects, it is important that this Court reaffirm the procedures which Congress intended to safeguard such investment. Petitioners contend that the lawfulness of their original rates should be judged, and any authority to prescribe different rates should be exercised, upon a fair hearing, with due process of law, upon a record which allows judicial review.

Accordingly, for the reasons set forth above, the decision of the United States Court of Appeals for the Fifth Circuit should be Reversed.

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STATUTORY APPENDIX

STATUTORY APPENDIX

Interstate Commerce Act

§ 1. Regulation in general; car service; alteration of line

Carriers subject to regulation

(1) The provisions of this chapter shall apply to common carriers engaged in—

* * *

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—49 U.S.C. § 1(1)(b) (1976) (originally enacted as the Act to Regulate Commerce of 1887, ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.

* * *

Definitions

(3) (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; . . . 49 U.S.C. § 1(3)(a)(1976) (originally enacted as Interstate Commerce Act of 1887, ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, ch. 3591, §1, 34 Stat. 584; Act of June 18, 1910, ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, ch. 722, Title I, § 2 (a), (b), 54 Stat. 899).

* * *

Just and reasonable charges; applicability; criteria for determination

(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this part. 49 U.S.C. § 1(5)(a)(1976) (originally enacted as the Act to Regulate Commerce of 1887, ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, ch. 722, Title I, § 2(d), 54 Stat. 899; Act of Aug. 2, 1949, ch. 379, § 1, 63 Stat. 485; Act of Feb. 5, 1976, Pub. L. 94-210, Title II, § 202(a), (b), 90 Stat. 34, 35).

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§ 6. Schedules and statements of rates, etc., joint rail and water transportation

Schedule of rates, fares, and charges; filing and posting

(1) Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. . . . The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter. 49

U.S.C. § 6(1) (1976) (originally enacted as the Act to Regulate Commerce of 1887, ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; Act of June 29, 1906, ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, ch. 91, § 409, 41 Stat. 483; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543).

• • •

Change in rates, fares, etc.; notice required; simplification of schedules

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, . . . 49 U.S.C. § 6(3) (1976) (originally enacted as Interstate Commerce Act of 1887, ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; Act of June 29, 1906, ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, ch. 91, §§ 409, 410, 41 Stat. 483).

• • •

Transportation without filing and publishing rates forbidden; rebates; privileges

(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless

the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; . . . 49 U.S.C. § 6(7) (1976) (originally enacted as Interstate Commerce Act of 1887, ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; Act of June 29, 1906, ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, ch. 91, § 411, 41 Stat. 483; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543).

• • •

§ 13. Complaints to and investigations by Commission Complaint to Commission of violation of law by carrier; reparation; investigation

(1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition. . . . If . . . such carrier or carriers shall not satisfy the complaint . . . , or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of. . . . 49 U.S.C. § 13(1) (1976) (*originally enacted as* Act to Regulate Commerce, ch. 104, pt. I., § 13, 24 Stat. 383; *as amended* by the Mann-Elkins Act of 1910, ch. 309, § 11, 36 Stat. 550; the Transportation Act of 1920, ch. 91, § 416, 41 Stat. 484; Act of August 9, 1935, ch. 498, § 1, 49 Stat. 543.

(4) Whenever, in any such investigation the Commission, after full hearing, finds any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable advantage, preference, or prejudice . . . , or unjust

discrimination . . . , which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, ... 49 U.S.C. § 13(4) (*originally enacted as* Act to Regulate Commerce, Feb. 4, 1887, ch. 104, pt. I., § 13, 24 Stat. 383; *as amended by* the Transportation Act of 1920, Feb. 28, 1920, ch. 91, § 416, 41 Stat. 484; Act of August 12, 1958; Pub. L. No. 85-625; § 4, 72 Stat. 570; Act of February 5, 1976, Pub. L. No. 94-210, Title II, § 210, 90 Stat. 46.)

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§ 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. 49 U.S.C. § 8 (1976) (originally enacted as Interstate Commerce Act of 1887, ch. 104, pt. I, § 8, 24 Stat. 332; *as amended by* Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543).

• • •

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

Commission empowered to determine and prescribe rates, classifications, etc.

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any

pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed. 49 U.S.C. § 15(1) (1976) (originlly enacted as Interstate Commerce Act of 1887, ch. 104, pt. I, § 15, 24 Stat. 384, *as amended by* Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 589; Act of June 18, 1910, ch. 309, § 12, 36 Stat. 551; Act of Feb. 28, 1920, ch. 91, § 418, 41 Stat. 484; Act of June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, ch. 722, Title I, § 10(a), 54 Stat. 911).

• • •

Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroad subject to chapter

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid,

and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this chapter. 49 U.S.C. § 15(7) (1976) (originally enacted as Mann-Elkins Act of 1910, ch. 309, § 12, 36 Stat. 551, *amending* Act of Feb. 4, 1887, ch. 104, pt. I, § 15, 24 Stat. 384, *and as amended by* Act of Feb. 28, 1920, ch. 91, § 418, 41 Stat. 484; Act of Mar. 4, 1927, ch. 510, § 2, 44 Stat. 1447; Act of Sept. 18, 1940, ch. 722, Title I, § 10(c), 54 Stat. 912; Act of Feb. 5, 1976, Pub. L. No. 94-210, Title II, § 202(e)(1), 90 Stat. 36).

* * *

§ 15a. Fair return for carriers

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; . . . and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. This paragraph shall not apply to common carriers by railroad subject to this chapter. 49 U.S.C. § 15a(2) (*Originally enacted as* the Transportation Act of 1920, ch. 91, § 422, 41 Stat. 488,

amending the Act to Regulate Commerce, Feb. 4, 1887, ch. 104, pt. I.; *as amended by* Act of June 16, 1933, ch. 91, Title II, § 205, 48 Stat. 220; Act of Aug. 9, 1935, ch. 498 § 1, 49 Stat. 543; Act of Sept. 18, 1940, ch. 722, Title I, § 10 (e), 54 Stat. 912, Act of Aug. 12, 1958, Pub. L. No. 85-625, § 6, 72 Stat. 572; Act of July 10, 1973, Pub. L. No. 93-69, Title II, § 201, 87 Stat. 166; Act of Feb. 5, 1976, Pub. L. No. 94-210, Title II, §§ 203(b), 205, 90 Stat. 39, 41.)

Trans-Alaska Pipeline Authorization Act

§ 1. Congressional findings and declaration

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

(d) A supplemental pipeline to connect the North Slope with a trans-Canada pipeline may be needed later and it should be studied now, but it should not be regarded as an alternative for a trans-Alaska pipeline that does not traverse a foreign country. 43 U.S.C. § 1651 (1976) (Act of Nov. 16, 1973, Pub. L. 93-153, Title II, § 202, 87 Stat. 584).

§ 2. Authorizations for construction—Congressional declaration of purpose

(a) The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto. 43 U.S.C. § 1652(a) (1976) (Act of Nov. 16, 1973, Pub. L. 93-153, Title II, § 203, 87 Stat. 584).

FOR ARGUMENT

Supreme Court, U. S.
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Nos. 77-452, 77-457, 77-551 and 77-602

In the Supreme Court of the United States

OCTOBER TERM, 1977

MOBIL ALASKA PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

EXXON PIPELINE COMPANY, PETITIONER

v.

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BP PIPELINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ARCO PIPE LINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77–452

MOBIL ALASKA PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 77–457

EXXON PIPELINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 77–551

BP PIPELINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 77–602

ARCO PIPE LINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (A. 746a–A. 771a) is reported at 557 F. 2d 775. The principal order of the Interstate Commerce Commission (A. 623a–646a) is reported at 355 I.C.C. 80.

JURISDICTION

The judgment of the court of appeals (A. 772a) was entered on July 29, 1977. A timely petition for rehearing was denied on September 8, 1977 (A. 774a). The petitions for a writ of certiorari in Nos. 77–452 and 77–457 were filed on September 22, 1977, the petition in No. 77–551 was filed on October 12, 1977, and the petition in No. 77–602 was filed on October 25, 1977. The petitions were granted on November 28, 1977 (A. 789a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission had authority under Section 15(7) of the Interstate Commerce Act to suspend for seven months the operation of initial schedules stating new rates for the interstate transportation of crude oil by pipeline.

2. Whether the Commission had authority to allow interim rates for such transportation to go into effect during the suspension period and to announce in advance the maximum interim rate level it would be willing to accept without suspension.

3. Whether the Commission had authority to condition its acceptance of a carrier's interim rate filing without suspension on the carrier's agreement to refund the portion of any charges it collects in excess of what may later be found, after a full hearing pursuant to Section 15(1) of the Act, to be the just and reasonable rate level.

STATEMENT

This case involves the validity of an order of the Interstate Commerce Commission that (1) suspended for seven months the operation of tariffs filed by petitioners stating new rates for the transportation of crude oil through the Trans-Alaska Pipeline System (TAPS), (2) instituted an investigation into the lawfulness of the rates contained in the suspended tariffs, and (3) authorized petitioners to file tariffs stating reduced interim rates for the suspension period.

A. STATUTORY FRAMEWORK

Congress has declared that "the national transportation policy [is] * * * to encourage the establishment and maintenance of reasonable charges for transportation services." 54 Stat. 899, note preceding 49 U.S.C. 1. It has directed that "[a]ll of the provisions of [the Interstate Commerce] Act shall be administered and enforced with a view to carrying out the above declaration of policy" (*ibid.*).

Part I of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1–27, applies to common

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carriers, such as petitioners, engaged in the interstate transportation of oil by pipeline, 49 U.S.C. 1(1).[1] It provides that "[a]ll charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." 49 U.S.C. 1(5). This fundamental requirement that all rates be just and reasonable is enforced by provisions imposing filing requirements on carriers, giving injured persons prospective and retrospective remedies, and empowering the Commission to block or eliminate unjust or unreasonable charges.

Neither the petitioners nor any other common carrier subject to Part I of the Act may lawfully en-

[1] Part I of the Act also applies to interstate transportation of passengers or property by railroad and certain other commodities by pipeline. Part II of the Act, 49 Stat. 584, as amended, 49 U.S.C. 301–327, applies to the interstate transportation of passengers or property by motor carriers. Part III of the Act, 54 Stat. 929, as added and amended, 49 U.S.C. 901–923, applies to the interstate transportation of passengers or property by water carriers. Part IV of the Act, 56 Stat. 284, as added and amended, 49 U.S.C. 1001–1022, applies to freight forwarders.

Administration of Part I of the Act, insofar as it applies to the transportation of oil by pipeline, was transferred from the Interstate Commerce Commission to the Department of Energy and the Federal Energy Regulatory Commission on October 1, 1977, pursuant to the Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565, and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977). The investigation of TAPS rates instituted by the Interstate Commerce Commission is continuing before the Federal Energy Regulatory Commission. Unless the context indicates otherwise, references in this brief to the "Commission" denote both Commissions.

gage in interstate transportation unless the applicable rates, fares, and charges have been filed and published in accordance with the Act's provisions. 49 U.S.C. 6(1), 6(7). No change may be made in the rates, fares, or charges filed with the Commission except on appropriate notice to the Commission and the public through the advance filing of schedules showing the proposed changes. 49 U.S.C. 6(3).

The Commission is empowered to investigate, either on its own initiative or on complaint of any person, the lawfulness of any rate, fare, or charge. 49 U.S.C. 13(1), 15(1). If "after full hearing" the Commission finds that any rate is unjust, unreasonable, or otherwise unlawful, it is "empowered to determine and prescribe what will be the just and reasonable * * * rate, fare, or charge * * * to be thereafter observed * * *, and to make an order that the carrier or carriers shall cease and desist from such violation * * *." 49 U.S.C. 15(1). Any carrier who violates the Act's provisions "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation * * *." 49 U.S.C. 8.[2]

The Act thus provides both prospective relief (the Commission's authority to prescribe reasonable rates and set aside unreasonable ones) and retrospective re-

[2] An injured person may seek to recover such damages either by filing a complaint with the Commission or by bringing an action in an appropriate United States District Court. 49 U.S.C. 9, 13(1), 16(1); 28 U.S.C. 1337.

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lief (damages to persons injured by unlawful rates). Recognizing that even these remedies are not sufficient to protect the public interest fully, Congress enacted the Mann-Elkins Act of 1910, 36 Stat. 539, 552, which empowered the Commission to suspend proposed rates pending investigation. This statute is at the heart of this case. The current version provides (49 U.S.C. 15(7)):

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, * * * the Commission shall have * * * authority * * * to enter upon a hearing concerning the lawfulness of such rate, fare, [or] charge * * *; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier * * * a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, [or] charge, * * * but not for a longer period than seven months beyond the time when it would otherwise go into effect * * *.

If the suspension period expires before the investigation is concluded, "the proposed change of rate, fare, [or] charge * * * shall go into effect," subject to the Commission's power, in certain situations, to order the carrier to keep account of all amounts received by reason of an increased charge and to order the carrier to refund any portion of the rate that is found not justified.

B. PROCEEDINGS BEFORE THE COMMISSION

Eight owner-carriers built the Trans-Alaska Pipeline System to transport crude oil some 800 miles from Prudhoe Bay on Alaska's North Slope to the port of Valdez on the Gulf of Alaska. Each of the owners holds an undivided interest in the pipeline, and each has an obligation to use its share of the pipeline's capacity as an independent common carrier.[3] Seven of the eight TAPS owners are affiliated with companies engaged in the production of North Slope oil.[4]

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[3] The background and facts of this case are fully set out in the brief of the State of Alaska and the Arctic Slope Regional Corp. ("Alaska Br."). In the interest of brevity, we substantially adopt the statement of that brief.

[4] The eight carriers, and their ownership shares, are: Sohio Pipe Line Co. (33.34%), ARCO Pipe Line Co. (21%), Exxon Pipeline Co. (20%), BP Pipelines Inc. (15.84%), Mobil Alaska Pipeline Co. (5%), Phillips Alaska Pipeline Corp. (1.66%), Union Alaska Pipeline Co. (1.66%), and Amerada Hess Pipeline Corp. (1.5%). A. 749a n. 3.

ARCO, Exxon, BP, and Mobil are petitioners in this case. Sohio, Union, and Amerada Hess are intervenors and have joined in the brief for the petitioners. Unless otherwise indicated, references to "petitioners" include the intervenors.

Phillips is not a party. Its case arose later, and it challenged the Commission's separate order in the Court of Appeals for the District of Columbia Circuit (No. 77-1741, filed August 17, 1977). That court is holding the case in abeyance pending this Court's decision in the present case.

All but one of the TAPS owners has access to substantial amounts of crude oil through affiliated companies engaged in production of the Alaskan North Slope oil. Petitioners' statement that British Petroleum Co., Ltd. has no access to crude oil "now in production" (Pet. Br. 5-6) is true but overlooks the fact that Sohio is bound by agreement with British Petroleum to tender oil to BP

The carriers filed with the Interstate Commerce Commission tariffs stating rates for the movement of oil.[5] The tariffs stated rates of from $6.04 to $6.44 per barrel of oil (A. 624a). The Department of Justice, the State of Alaska, the Arctic Slope Regional Corporation, and the Commission's Bureau of Inves-

Pipelines Inc. to the extent of the latter's ownership of TAPS or in the alternative to lease the BP pipeline interest. Further, when Prudhoe Bay production reaches 1.2 million barrels a day (expected to occur in April 1978), BP will have a 54 percent stock interest in Sohio. 2 *Moody's Industrial Manual* 2882 (1977). Petitioners' listing of the State of Alaska as a participant in the Prudhoe Bay field also is misleading, because Alaska holds only a royalty interest rather than an equity interest in production. We have adjusted the table presented in petitioners' brief to reflect more accurately the ownership interests in production.

[In percentage]

	Net equity interest in oil rim participating area of the Prudhoe Bay Unit	TAPS interest of subsidiary
Sohio/BP	53.155	49.18
Atlantic Richfield Co.	20.274	21.00
Exxon Corp.	20.274	20.00
Mobil Oil Corp.	2.094	5.00
Phillips Petroleum Corp.	2.044	1.66
Amerada Hess Corp.	.538	1.50
Union Oil Co. of California	------	1.66
Ten other producers	1.619	------
Total	100.000	100.00

[5] The tariffs were filed between May 27 and June 20, 1977, and contained effective dates ranging from June 20 to July 20, 1977 (A. 749a and n. 5).

tigations and Enforcement filed protests and petitions for suspension of the tariffs (A. 623a).[6]

Because of the importance of the proceeding, the Commission chose to consider the investigation and suspension issues itself instead of following the usual procedure of referring the matter to its Suspension Board. See A. 750a n. 8. The Commission held a full day of oral argument in which all parties participated. The Commission received extensive written materials from all parties concerning the reasonableness of the proposed rates.

On the day after the hearing, the Commission began an investigation of the lawfulness of the proposed rates pursuant to Section 15(1) and (7) of the Act and suspended those rates during the investigation for the statutory period of seven months (A. 623a–646a).

The Commission explained its decision to institute an investigation as follows (A. 624a–626a):

> In order for a rate to be lawful, a primary requirement is that it be just and reasonable * * *. [T]he question raised by the protests is whether there is reason to believe the proposed rates are not just and reasonable.

[6] Alaska has a royalty interest in and places a severance tax on the extraction of oil. Its interests are affected because higher transportation rates reduce the wellhead value of the oil itself. Arctic Slope is owed compensation that will be paid at a rate depending on the wellhead value of the oil; a lower wellhead value may mean substantial delay in the payment of compensation. These interests are fully described at Alaska Br. 6–8. See also A. 749a–750a and nn. 6, 7.

Protestants contend that the filed rates would provide excessive profits, whether compared with a traditional rate of return on valuation or with the carrier's capital costs. They also contend that the cost data provided by the carriers is overstated.

* * * [W]hile there may be merit to the carriers' contentions that the standards used by protestants do not cover their true costs of capital, this is a matter that cannot be resolved until a more complete record is developed. Finally, evidentiary hearings will be necessary to develop acceptable cost data for use in applying whatever measures of reasonableness are found to be appropriate. * * * [W]e conclude that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates.[7]

[7] Petitioners' proposed rates were calculated by a method that would have afforded them double earnings on debt capital. In computing their requested return on valuation, petitioners included interest both as part of their return on valuation and as a deductible cost of doing business. But the return on valuation is intended to compensate fully both debt and equity holders. The result was that petitioners were seeking twice the revenue needed to compensate the debt portion of their capital structure. See Alaska Br. 13–15.

The Commission concluded that this was impermissible (A. 632a–633a). It referred, instead, to the standards recently reaffirmed in *Petroleum Products, Williams Brothers Pipe Line Co.*, 355 I.C.C. 479, petition for review pending *sub nom. Farmers Union Central Exchange* v. *Federal Energy Regulatory Commission*, C.A.D.C., No. 76–2138, adjusted upward to take into account the "higher risk factor" involved in operating TAPS (A. 634a). The Commission determined that ten percent was an appropriate return on the investment in TAPS because (1) "the magnitude and inherent attributes of the TAPS project produce a higher risk

The Commission concluded that its power to suspend "any schedule stating a new individual or joint rate, fare, or charge" (Section 15(7)) included the power to suspend initial rates such as those filed by petitioners (A. 626a–627a). The Commission stated that "the maintenance of excessively high rates could act as * * * an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil" (A. 627a). Although the Commission "accept[ed] the basic data supplied by the carriers" (A. 630a), it concluded that in these circumstances, where "the protestants have made a showing of [the] probable unlawfulness" of the rates suspension was preferable to the alternative of a later refund of excessive charges (*id.* at 627a).

In order to permit the pipeline to commence operation prior to the expiration of the seven-month suspension period, the Commission informed the carriers that they could file lower interim rate tariffs (A. 628a–

factor than is normal in crude oil pipeline operations" (A. 634a), and (2) "a 10 percent return on valuation appears generally sufficient to cover estimated capital costs" (A. 635a). The rates the carriers had proposed would have provided much higher returns; the interim rates that the Commission was willing not to suspend (see pp. 11–12, *infra*) provided a composite return on equity of 23.0 percent (A. 635a, 646a).

Petitioners' assertion that the Commission "did not permit the carriers to deduct their interest costs as a cost of doing business" (Br. 11) is therefore misleading. It did not allow a "deduction" because interest costs were included in the ten percent return on valuation. The rate of return therefore was adequate to compensate petitioners for the cost of the debt portion of their capital structure.

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635a) and stated that it would not suspend the interim tariffs if they specified rates no higher than those announced in the order (A. 638a).[8] The Commission anticipated that these rates, computed on the basis of data supplied by the carriers, would allow them at least a 10 percent return on investment. The rates derived from the Commission's formula were (A. 753a):

	Rates filed by TAPS owners	Rates authorized by order	Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59
Arco Pipe Line Co.	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Co.	6.27	5.10	1.17
Mobil Alaska Pipeline Co.	6.31	4.84	1.47
Phillips Alaska Pipeline Corp.[*]	6.22	[4.87]	[1.35]
Sohio Pipe Line Co.	6.16	4.70	1.46
Union Alaska Pipeline Co.	6.09	4.89	1.20

* The figures for Phillips were not included in the court of appeals' opinion.

[8] The Commission rejected arguments that it could not properly accept interim rates for the suspension period and that it could not properly announce in advance the rate level that it would be willing to accept without suspension. "These interim rates would not be intended to have permanent effect, but would merely be interim rates that we would allow to be collected during the suspension period. Such rates, if filed, remain subject to Commission scrutiny and are not to be considered as prescribed within the meaning of the decision in *Arizona Grocery* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370" (A. 628a–629a). The Commission explained further: "We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest" (A. 629a).

The Commission "recognize[d] that even the lower interim rate levels may prove upon investigation to exceed reasonable levels" (A. 636a). It therefore stated that it was willing not to suspend the interim rates only if the carriers would agree (1) to keep account of the amounts collected under the interim rates (and under the original rates if they became effective at the end of the seven-month suspension period), and (2) "to refund any portion of such amounts that may ultimately be established as excessive" (A. 636a).[9]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, with one judge dissenting, denied relief and dismissed the petitions for review (A. 746a–771a). The court determined, on the basis of the language of Section 15(7), the legislative policy underlying the statute, and a comparison of that statute with other statutes conferring authority to suspend rates, that the Commission had power to suspend initial rate tariffs (A. 755a–757a). The court further concluded that the Commission "as [a] corollary to its suspension power had the power to set out allow-

[9] The Commission denied petitions for reconsideration filed by some of the carriers as well as some protestants (A. 775a–781a).

able rate ceilings for the seven-month period which, if filed, it would not suspend" (A. 760a).[10] The court finally held that the refund conditions were "a valid corollary to the suspension power" (A. 761a).

Petitioners then filed interim rate tariffs; the Commission did not suspend those tariffs, and petitioners commenced pipeline operations.

On October 20, 1977, after the court of appeals had denied petitions for rehearing (A. 774a) and motions to stay the mandate and to stay the order of the Commission (A. 773a), this Court stayed the Commission's suspension order pending final disposition of the petitions for certiorari (A. 784a–788a). The stay was conditioned on petitioners' agreement to keep account of charges collected during the pendency of the stay and to refund any portion of such charges that it is ultimately determined they were not entitled to collect.

On November 14, 1977, this Court entered a more complete order allowing petitioners to collect the rates set forth in their initial tariffs, provided that they keep account of sums collected and refund any amounts ultimately found by this Court not to be lawful (A. 785a–788a).

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[10] The dissenting judge was willing to assume, for the sake of argument, that the Commission had the power to suspend petitioners' initial rates (A. 764a). In his view, however, the Commission had no authority to announce its willingness to accept without suspension interim rate filings at the specified level (A. 764a–771a).

SUMMARY OF ARGUMENT

I

Section 15(7) of the Interstate Commerce Act empowers the Commission to suspend for seven months, pending completion of an investigation, the operation of *"any* schedule stating a *new* individual or joint rate, fare or charge * * *" (emphasis added). Petitioners' argument that the initial rates at issue here are not "new" rates is contrary to the ordinary meaning of "new." Moreover, the reasons that led Congress to endow the Commission with the power to suspend—protection of the public from possibly unjust rates during the seven-month suspension period and the inadequacy of damages as a remedy—are as applicable to initial rates as they are to increased rates for existing services. There is nothing in the legislative history to indicate that the Commission may not suspend new rates for new services; what legislative history there is on the question contemplates that the Commission may do what it has done here.

Moreover, in Section 216(g) of the Act, 49 U.S.C. 316(g), Congress gave the Commission power to suspend "new rates" of motor carriers but added a grandfather clause, which made this power inapplicable to certain initial rates filed by carriers operating at the time the provision took effect. If initial rates had not been included within the suspension power, there would have been no need for the grandfather clause. Petitioners do not explain why the Commission's interpretation of Section 15(7) as allowing

suspension of initial rates filed by pipelines is unreasonable when Congress itself has interpreted the same language in Section 216(g) as allowing the suspension of initial rates filed by trucking companies.

The facts of this case demonstrate why the suspension power should apply to initial rates and why petitioners are mistaken in urging that the availability of damages is an adequate remedy for problems posed by unjustly high initial rates. Because the delivered price of North Slope crude oil is fixed by the price of oil on the world market, high pipeline transportation charges are not reflected in the price to the consumer but rather in the reduced royalties and taxes paid to the State of Alaska and the Arctic Slope Regional Corporation. Moreover, the owners of the pipeline are subsidiaries of the shippers of the oil, and thus the shippers who pay the higher pipeline transportation costs have little incentive to seek reparations, especially because the subsidiaries would be forced to disgorge excess charges to the State and to the Arctic Slope Regional Corporation. Excessive pipeline rates would also discourage exploration and development by non-affiliated oil producers, whose earnings would be reduced by higher transportation charges. The power to suspend is necessary fully to protect the public interest in cases such as this.

Finally, the Commission consistently has interpreted Section 15(7) as providing the power to suspend initial rates as well as changed rates, and that interpretation is entitled to deference.

II

Because a decision to suspend rates is based on the Commission's conclusion that the rates, as filed, are apparently too high, the Commission must form at least a tentative view of where the line between "too high" and "not too high" appears to be. Section 15(7) requires the Commission to give reasons for suspending a schedule of rates, and here the Commission stated that the filed rates were apparently too high because they fell on the high side of that tentative line, which it identified. I also stated what could then readily be inferred: that if the carriers filed rates that were on or below that line, the Commission would not suspend them. Nothing in the Act prohibits the Commission from revealing this information. The Commission's statement here simply avoided a wasteful series of filings and re-filings by petitioners. This reasonable action by the Commission is not "ratemaking" but rather "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation." *United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500, 514. Any pressure petitioners may have felt to file rates at the level identified in the Commission's order was simply the consequence of the statutory scheme and the financial demands impelling petitioners to transport oil as soon as possible.

III

The Commission's statement that it would allow the interim rates to go into effect only if the petitioners

agreed to refund any part of the rates ultimately found not to be just and reasonable simply reflects the Commission's decision to give the carriers the benefit of the doubt. The Commission could have required the carriers to collect only a lower rate as a condition of not suspending; it instead allowed them to collect the interim rates at issue here, calculated on the basis of sharply disputed data supplied by them, but found that this would be reasonable only if the Commission could be assured that the carriers would refund any amounts later found, after a full hearing, to be excessive.

A self-executing refund requirement is particularly appropriate in this case for generally the same reasons that suspension was appropriate. The shippers have little incentive to complain of high rates because the excess rates are collected by their subsidiaries. The Commission thus did no more than this Court has done in the past when it has allowed a suspended or enjoined rate to take effect pending the disposition of litigation before the Court. See, *e.g., Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 409 U.S. 801. There is no reason to think that the Commission will apply any refund order so inflexibly that the petitioners will be foreclosed from demonstrating that start-up costs for the pipeline justify early rates somewhat higher than those ultimately approved as permanent rates.

ARGUMENT

The issues in this case concern the existence, not the exercise, of the Commission's statutory power. If the Commission was empowered to suspend petitioners' initial rate tariffs, to announce the maximum interim rates it would accept without suspension, and to impose a refund condition on its acceptance of such interim rates without suspension, that is the end of the matter. Neither the lawfulness nor the reasonableness of either the proposed or the interim rates is before this Court.[11]

[11] Suspension orders within the scope of the Commission's power under Section 15(7) are not judicially reviewable. *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669; *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 667. See also *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, C.A.D.C., No. 75-1641, decided October 17, 1977, slip op. 10. See also *Port of New York Authority* v. *United States*, 451 F. 2d 783, 786–788 (C.A. 2); *Oscar Mayer & Co.* v. *United States*, 268 F. Supp. 977, 980–981 (W.D. Wis.) (three-judge court); *Luckenback Steamship Co.* v. *United States*, 179 F. Supp. 605 (D. Del.) (three-judge court), affirmed in part and vacated in part, 364 U.S. 280; Davis, *Administrative Law Treatise* § 28.16, p. 966 (1970 Supp.).

We agree with petitioners that questions concerning the scope of the Commission's authority may be reviewed; only questions of the propriety or wisdom of its exercise in particular cases are unreviewable under the rule of *Arrow*. Cf. *Adamo Wrecking Co.* v. *United States*, No. 76-911, decided January 10, 1978, slip op. 9–10. Petitioners apparently argue, in addition, that courts may review suspension decisions for reasonableness as well as for statutory authority (Br. 34–35 and n. 50). But *Arrow* indicates the contrary (372 U.S. at 670). Decisions to suspend or not to suspend are unreviewable because the provisions of Section 15(7) represent a "careful accommodation" that would be "disturb[ed]" by judicial review (*SCRAP*, *supra*, 412 U.S. at 697). See also Alaska Br. 30 and n. 44. In any event, the fundamental premise of

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I

THE COMMISSION HAD AUTHORITY UNDER SECTION 15(7) OF THE INTERSTATE COMMERCE ACT TO SUSPEND FOR SEVEN MONTHS THE OPERATION OF INITIAL SCHEDULES STATING NEW RATES FOR THE INTERSTATE TRANSPORTATION OF CRUDE OIL BY PIPELINE

Section 15(7) of the Interstate Commerce Act empowers the Commission to suspend for up to seven months, pending completion of an investigation, the operation of "*any* schedule stating a *new* individual or joint rate, fare, or charge * * *" (emphasis added). Petitioners ask this Court to create, as an exception to Section 15(7), a special category of rates—those embodied in a pipeline's initial tariff—that would be wholly exempt from regulation until the Commission could complete a full ratemaking proceeding; as a result, these rates could be as high as the carrier set them. Such a result would be contrary to the national transportation policy "to encourage the establishment and maintenance of reasonable charges for transportation services," note preceding 49 U.S.C. 1, and is

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the court of appeals' opinion was that courts may not review the substance of decisions to suspend or not to suspend. The petitions for certiorari did not challenge that premise, and this Court therefore should not pass on that issue. See Rule 23(1)(c) of the Rules of this Court; *Quilloin* v. *Walcott*, No. 76–6372, decided January 10, 1978, slip op. 7 n. 13. What is more, petitioners do not discuss in any comprehensive way the reasonableness of the Commission's decision, although they repeatedly express their disagreement with it. In these circumstances, then, the only questions requiring decision concern the scope of the Commission's statutory authority.

incompatible with the statutory scheme fashioned by Congress to implement that policy.[12] Petitioners' contention that the Commission is powerless to suspend initial rates under Section 15(7) depends entirely on their argument that initial rates are not "new rates" within the meaning of that section. Petitioners' construction of the statute, however, is contrary to its plain words, to its legislative history, and to the Commission's consistent interpretation of the statute.

A. INITIAL RATES ARE "NEW" RATES

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (Powell, J., concurring). Petitioners argue that their initial rates are not "new" rates. But "new" is not an arcane or specialized word. It is not a term of art. If these rates are not new, then "new" has lost all meaning. The rates are as new as new can be, and petitioners cannot change that fact.

Nothing in the ordinary usage of "new" distinguishes the first rate ever (*i.e.*, the initial rate) from a rate that replaces a pre-existing rate (*i.e.*, the changed rate). Both are "new" rates, and petitioners can point to no authority refuting the Commission's

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[12] The result sought by petitioners would also be inconsistent with the recently adopted National Energy Policy to "promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost * * *." Pub. L. 95–91, Section 102(9), 91 Stat. 565.

perfectly conventional interpretation of this perfectly ordinary word.

Indeed, if there were any difficult question of statutory construction here, it would be whether a changed rate for an existing service is a "new rate." The legislative history of the suspension power, which we discuss at pages 26–34, *infra,* shows principally that Congress was at pains to make it clear that "new rate" *included* changed rates. Nothing shows that "new rate" *excluded* initial rates for new services. Because no pertinent legislative history contradicts the apparent meaning of the statute, we believe that the statutory language should be given its ordinary meaning. Compare *United Airlines, Inc.* v. *McMann,* No. 76–906, decided December 12, 1977, slip op. 6–7, and *Swain* v. *Pressley,* 430 U.S. 372, with *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 9–25.

B. CONGRESS INTENDED TO INCLUDE INITIAL RATES IN THE SUSPENSION POWER

1. The purposes of the suspension power are applicable to initial rates no less than to changed rates

The Interstate Commerce Act prior to 1910 authorized the Commission to set aside an unreasonable rate and prescribe a reasonable rate, and it gave injured persons the right to recover damages incurred by unlawful rates. But principally because of a perceived pattern of abusive rail rate increases, which the Commission was powerless to address until after lengthy

hearings that often consumed months or years, Congress determined that the existing remedies of rate prescription and reparations were not enough to protect the public interest. The public was exposed, from the time a rate was filed until the completion of a hearing, to financial injury from a carrier's collection of excessive charges. Section 15 of the Mann-Elkins Act of 1910, 36 Stat. 552, gave the Commission power to suspend rates pending an investigation of their lawfulness. See generally *United States* v. *Chesapeake & Ohio R. Co.,* 426 U.S. 500 (*Chessie*); *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U.S. 658.

In granting the Commission this suspension power, Congress intended "to protect the public from the irreparable harm resulting in unjustified increases in transportation costs by giving the Commission 'full opportunity for * * * investigation' *before* the tariff became effective." *Chessie, supra,* 426 U.S. at 513 (emphasis in original; footnote omitted). Congress recognized that the "suspension mechanism [was] a particularly potent tool" that gave the Commission "'tremendous power'" (*ibid.*). Congress considered it essential, however, that the Commission be "provided a 'means * * * for checking at the threshold new adjustments that might subsequently prove to be unreasonable or discriminatory, safeguarding the community against irreparable losses and recognizing more fully that the Commission's essential task is to establish and maintain reasonable charges and proper rate relationships.'" *Ibid.*, quoting from 1 Sharfman, *The Interstate Commerce Commission* 59 (1931).

Congress' decision to authorize the drastic remedy of suspension rests on its conclusion that the charging of unreasonable rates causes harm that cannot be repaired by restitution; some of the harm takes place in the economy at large, and reparations to shippers cannot undo damage that may have spread more widely. It rests on Congress' conclusion that full ratemaking takes time and certainly cannot be completed before rates become effective in the first instance. The suspension power enables the Commission to forestall irreparable harm if it can identify in advance rates that appear to be unjust or unreasonable.

Appearances may of course be deceiving; the Commission must act on less than complete information if it is to decide cases expeditiously. Suspensions sometimes will prove to be unnecessary—although failure to suspend also may prove to be unwise. If an unnecessary suspension sometimes causes harm to carriers, there is a countervailing benefit to the public when unjust or unreasonable rates are suspended. Both the carriers' interests and those of the public must be considered, and here, as elsewhere when decisions must be made by governmental agencies, the interests of one group often must be subordinated to the interests of another.

The justifications for the suspension power apply fully to initial rates for new services. The Commission may assess the reasonableness of initial rates just as it may assess the reasonableness of changed rates. The National Transportation Policy does not differentiate

between initial and changed rates, nor does any other provision of the statute (see pages 3–6, *supra*). Initial rates may be excessive, and excessive rates may cause irreparable injury before full ratemaking can be completed. Excessive rates for the movement of oil would decrease the value of oil at the wellhead, and such a decrease would discourage exploration for oil at a time when the Nation needs to promote the discovery of new oil. A decrease in the wellhead value of oil would delay payment of the compensation that is due to the Arctic Slope Regional Corporation. It would affect the tax and royalty revenues of the State of Alaska; the State estimates that every penny of excessive charge would cost it one million dollars yearly (Alaska Br. 7 n. 11). These effects are not easily undone (see pages 37–38, *infra*). Full evaluation of the rates proposed for TAPS will take some time, and so prompt interim action was essential to prevent irreparable injury.[13] If the rates were excessive—or if they reasonably appeared to be excessive—a suspension was justified for the same reasons that a suspension is justified when a carrier increases the rates for an existing service. Cf. *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388.

[13] Petitioners opposed a prefiling investigation of TAPS rates, arguing that it would be premature. Petitioner Exxon argued that it would be premature because the Commission could suspend any proposed rates and then study them (see the quotation at Alaska Br. 8 n. 16). Until joining the other petitioners' brief in this Court, petitioner Exxon had not contended that the Commission lacks the power to suspend initial rates.

Petitioners have combed the legislative history of the Mann-Elkins Act of 1910 and the Transportation Act of 1920, 41 Stat. 456, 486, in an effort to find some indication that Congress intended to limit the Commission to suspending changed rates for old services. They have collected a number of references to rate changes and rate increases (Br. 18–26); these references persuasively demonstrate that the Commission may suspend changes and increases. But not one snippet from the legislative history indicates that the Commission may *not* suspend new rates for new services.[14] The absence is telling.

It may be that the absence is explained by the fact that the language of the statute is so plain that it did not require comment; a new rate for a new service is the paradigm of the "new * * * rate" that the statute authorizes the Commission to suspend. Or it may be that the matter escaped comment because Congress did not pay attention to it; when Congress voted in 1910 and 1920 the railroads had been built and transportation of oil by common carrier pipelines was uncommon (see S. Doc. No. 152, 73d Cong., 2d Sess. 53–56

[14] The "authoritative gloss" that petitioners say (Br. 24–26) can be found in the 1920 legislation therefore is an illusion. Congress added to Section 15(7) a proviso that if the investigation were not complete after seven months, the "proposed change of rate" could take effect, but nothing in the legislative history indicates why Congress chose this language or that Congress understood this to exclude initial rates. Developments after 1920 (see pages 28–36, *infra*) demonstrate that Congress understood "new rate" to include initial rates.

(1934)), so that initial rates for new services did not pose a problem requiring comment. But the statutory language is broader than the exigencies of 1910 and 1920; it allows the Commission to suspend any new rate.[15] All rate filings presented the same sort of problem, and all were addressed by the statute.

When legislators did mention the distinction between initial and changed rates, they evidently understood that the power to suspend "new" rates would include the power to suspend a carrier's initial filing. For example, Representative Richardson stated that the proposed legislation would give the Commission "the right to suspend *any* rate that the railroads may see proper to devise or ask to put into effect." Hearings on Bills Affecting Interstate Commerce before House Committee on Interstate and Foreign Commerce, 61st Cong., 2d Sess. 790 (1910). Representative Mann, in explaining the suspension provision on the floor of the House, spoke principally about proposed rate changes but also suggested, by distinguishing between a schedule "proposing to change an existing rate" and "a schedule stating a new rate," that in his view the suspension power would reach all rate filings. 45 Cong. Rec. 4711 (1910).

[15] See *Pfizer, Inc.* v. *Government of India*, No. 76-749, decided January 11, 1978, slip op. 3–4 (Congress did not explicitly consider whether a foreign government may collect damages for violations of the antitrust laws, but the statute should be construed to allow suits by foreign governments because that is most in keeping with its purposes).

Similarly, Section 9 of the Elkins Bill, the pertinent language of which was ultimately enacted as the provision granting the Commission suspension power, was characterized in a summary of the bill as a provision "regulating the filing of new rates *or* changes in old rates." Hearings on S. 3776 and S. 5106 before the Senate Committee on Interstate Commerce, 61st Cong., 2d Sess. 45 (1910) (emphasis added). This use of the disjunctive reflects an understanding that both initial and changed rates were to be subject to the suspension power. Cf. *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 565 n. 18.

2. The language and legislative history of nearly identical sections of other parts of the Act also demonstrate that initial rates are new rates

Congress demonstrated its understanding that initial rates are "new rates" when it subjected motor carriers, water carriers, and freight forwarders to regulation by the Interstate Commerce Commission. Congress included in each instance a provision giving the Commission the power to suspend rate filings pending a hearing on their lawfulness. Interstate Commerce Act, 49 Stat. 558, 561, as amended and added, 49 U.S.C. 316(g), 318(c), 907(g), 1006(e). These provisions are identical in all material respects save one to Section 15(7). The material difference is that each provision includes a "grandfather" clause making the provision inapplicable to certain "initial

schedules" filed by carriers operating at the time the provision took effect.[16]

For example, 49 U.S.C. 316(g) provides that the Commission may suspend for seven months "any schedule stating a new individual or joint rate, fare, [or] charge" filed by a motor carrier. It goes on to provide, however, "[t]hat this paragraph shall not apply to any *initial schedule or schedules* filed on or before July 31, 1938, by any such carrier in bona fide operation when this section takes effect" (emphasis added).

Congress must have believed that, unless it inserted the qualifying language, the Commission would have had the power to suspend initial rates as well as changed rates. As the court of appeals correctly stated, "[i]f initial rates were not covered there would have been no need for the grandfather clauses" (A. 756a).

When the statute was enacted in 1935, it contained a grandfather clause for all future initial tariffs of carriers in operation in 1935 (49 Stat. 560). Consequently, all initial rate filings by most motor carriers could not be suspended. The Commission's experience during the first few years after enactment, however, led it to recommend that Congress terminate the grandfather treatment in order to end the abuses committed by some carriers who were taking competitive

[16] In the case of 49 U.S.C. 1006(e), the clause exempts from coverage any "initial tariff" filed by a freight forwarder within 90 days after enactment, whether or not it was operating at the time the section took effect.

advantage of the situation. The Commission told Congress: "We believe that the time has passed for permitting initial tariffs to be immune from the suspension power." Hearings on S. 3606 before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 3d Sess. 9 (1938). Congress accepted the Commission's recommendation and enacted a termination date for the grandfather protection; the House Committee report stated that the amendment would "permit the Commission to suspend *any initial schedule* of a common carrier * * * filed after the date that the provisions of the bill become effective." H.R. Rep. No. 2714, 75th Cong., 3d Sess. 4 (1938) (emphasis added).[17]

That Congress in 1935 and 1938 interpreted "new rate" to include initial rates lends strong support to the Commission's long-standing interpretation of the same phrase in Section 15(7). "If it can be gathered from a subsequent statute, *in pari materia,* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman,* 3 How. 556, 564.[18]

Petitioners do not deny that the Commission is empowered to suspend initial motor carrier rate filings under 49 U.S.C. 316(g) (see Br. 29), nor do they

[17] The Commission frequently suspends initial motor carrier rates under 49 U.S.C. 316(g) (see A. 712a–717a).

[18] See also *Califano* v. *Sanders*, 430 U.S. 99; *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 275; *Erlenbaugh* v. *United States*, 409 U.S. 239, 243–244.

dispute the implication that the existence of this power has for the interpretation of the same language in Section 15(7). They advance instead an argument (Br. 29–30) that is not entirely clear. Petitioners seem to contend that: (1) motor carriers, unlike pipelines, must obtain from the Commission a certificate of public convenience and necessity before commencing interstate operation as a common carrier; (2) the Commission, prior to granting such a certificate to a motor carrier, "reviews and approves the new entrant's original rates" (Br. 30); and therefore (3) the Commission's admitted power to suspend those same initial rates "reflect[s] no more than a desire to give the Commission plenary licensing authority" (Br. 30).

This argument fails for several reasons. First, if the Commission "reviews and approves the new entrant's original rates" under its certification authority, why would it need suspension power? Only the *absence* of authority to review rates as part of certification authority would create a need for the more limited seven-month suspension authority. Petitioners themselves acknowledge this flaw in their argument, admitting in a footnote that, if the Commission has already approved an initial rate at the time of certification, "it would be inconsistent for it then to 'suspend' that rate" (Br. 30 n. 43). Petitioners do not explain why Congress would have conferred on the Commission a power to suspend that could not be exercised consistently with the power to certify.

Second, petitioners' argument starts with an incorrect premise. The Interstate Commerce Commission does not "review and approve" a carrier's initial rate at the time of certification.[19] The Federal Power Commission does review rates as part of licensing, and the difference highlights the nature of the Interstate Commerce Commission's authority. The Federal Power Commission was not given authority under the Natural Gas Act to suspend initial rates (see page 36 n. 22, *infra*); protection of the public interest therefore required a review of the proposed rates at the time of certification. *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378, 390. Because the Interstate Commerce Commission is empowered to suspend initial rates, it did not need authority to consider a carrier's initial tariff as part of certification. Just as the absence of suspension authority under the Nat-

[19] Rates are considered at the time of certification only when it is shown that the rates of existing carriers are so unreasonably high that they constitute an effective embargo against the available traffic. *E.g., Kroblin Refrigerated Xpress, Inc., Extension—Freight Forwarder Traffic,* 123 M.C.C. 831, 841; *Trans-Cold Express, Inc., Extension—Indiana,* 98 M.C.C. 10, 12; *H. L. & F. McBride Extension—Ohio,* 62 M.C.C. 779, 790. Even then, the carrier's initial rate is not "approved"; it must be filed and remains subject to the Commission's suspension power.

The case relied on by petitioners (Br. 30 n. 43)—*West Coast Bus Lines, Ltd., Common Carrier Application,* 41 M.C.C. 269—does not stand for the principle for which it is cited. The applicant's proposed rates were reviewed (not approved) by the Commission because the applicant sought certification on the strength of its lower rates and to that end voluntarily submitted to the Commission the initial rates it proposed to charge.

ural Gas Act magnifies the importance of an initial rate review prior to certification, so too does the absence of certification authority under Part I of the Interstate Commerce Act magnify the importance of the Commission's suspension power to protect the public from excessive initial rates.

Third, petitioners' argument concerning the motor carrier grandfather clause misses the point. Whatever Congress may have intended in giving the Commission authority to suspend initial motor carrier rate filings, and even accepting *arguendo* petitioners' apparent contention that Congress had different objectives for pipelines, the fact remains that the critical language of Section 316(g) allowing suspension for motor carriers is identical to that in Section 15(7) allowing suspension for pipelines. Petitioners do not explain why the Commission's interpretation of Section 15(7) as allowing suspension of initial rates should be viewed as unreasonable when Congress itself interpreted the same language in Section 316(g) as allowing the suspension of initial rates.[20]

[20] Petitioners find significance in the fact that pipelines are not licensed (Br. 30–31). But licensing decisions ask the question whether the public interest would be served by allowing a new carrier to offer transportation services in a particular market; the Commission may exclude a proposed new service. Suspension of rates has little to do with the question whether a new competitor should enter a market. The suspension decision concerns only the probable lawfulness or unlawfulness of the proposed rate. It is made whether or not the common carrier holds some kind of license. Suspension decisions never could bar entry for more than seven months and are unlikely even to postpone entry; even after

Section 316(g) also answers petitioners' contention (Br. 24–26) that the 1920 amendment to Section 15(7) placed an "authoritative gloss" on the meaning of "new rate." The Transportation Act of 1920 added to Section 15(7) a clause providing that, if a rate investigation has not been completed and an order made within the suspension period, "the proposed change of rate * * * shall go into effect at the end of such period." 41 Stat. 486–487. Petitioners argue that the phrase "proposed change of rate" was meant to be "interchangeable" with "new rate" and that "new" must therefore mean only "changed" (Br. 17).

Whatever superficial plausibility this argument may have fades when one refers to Section 316(g). It contains precisely the same clause: if the investigation has not been completed and an order made within the suspension period, "the proposed change of rate * * * shall go into effect at the end of such period." Petitioners concede that Congress intended to permit the Commission to suspend any initial schedule of a motor carrier filed after July 1, 1938. See also H.R. Rep. No. 2714, *supra*, at 4. Congress thus does not attribute to the "proposed change" clause in Section 316(g) the significance that petitioners ask this Court to give to the same clause in Section 15(7). If, as petitioners

a rate has been suspended, a carrier may file immediately another tariff stating different rates, and the Commission may determine not to suspend it. The fact that a particular rate proposal has been suspended does not mean that *no* rate may be charged for the full period of suspension.

suggest, "proposed change" and "new rate" mean the same thing, it is most logical to conclude that "change" was used in its literal sense to denote not only a change from one rate to another but also a change from no rate to an initial rate.

3. The practice under analogous statutory schemes supports the Commission's interpretation of Section 15(7)

The Commission's interpretation of Section 15(7) is fortified by the treatment of initial rates under similar legislation administered by other agencies. For example, under Section 204 of the Communications Act of 1934, 48 Stat. 1072, 47 U.S.C. 204, prior to its amendment in 1976, the Federal Communications Commission was empowered to suspend for up to three months "any new charge" filed with that agency by a carrier subject to its jurisdiction. The Communications Commission has always understood that suspension power to embrace both initial and changed rates.[21] In 1976 Section 204 was amended to extend the agency's suspension period and to expand its power to order the payment of refunds. Congress stated its understanding that the Communications Commission already had the power to suspend initial rates. See H.R. Rep. No. 94–1315, 94th Cong., 2d Sess. 4, 6 (1976); S. Rep. No. 94–918, 94th Cong.,

[21] See, *e.g.*, *American Telephone & Telegraph Co.*, 50 F.C.C. 2d 501, 510–511; *Western Union Telegraph Co.*, 47 F.C.C. 2d 639, 640; *Communications Satellite Corp.*, 38 F.C.C. 1286, 1293–1295; *Western Union International, Inc.*, 28 F.C.C. 2d 727, 31 F.C.C. 2d 554.

2d Sess. 3, 4 (1976). Congress changed the language of the section to make the meaning even clearer: Section 204 now provides that the Communications Commission may order refunds in the case of a proposed "charge for a new service *or* an increased charge" and that it may suspend "any new *or revised* charge." Pub. L. 94–376, 90 Stat. 1080, 47 U.S.C. (1976 ed.) 204(a) (emphasis added). These "minor language changes" were intended to "clarify" existing law. H.R. Rep. No. 94–1315, *supra,* at 6; S. Rep. No. 94–918, *supra,* at 7. Congress has demonstrated beyond doubt that an initial charge filed with the Communications Commission is a "new charge" for purposes of the suspension power. The result should be no different here.

On the other hand, when Congress has intended to exclude initial rates from the reach of an agency's suspension power, it has done so unambiguously. Section 1002(g) of the Federal Aviation Act of 1958, 72 Stat. 790, 49 U.S.C. 1482(g), which gives the Civil Aeronautics Board authority to suspend "new" rates, expressly excludes from that power "any initial tariff filed by any common carrier." The absence in Section 15(7) of any similar exclusion supports the conclusion that Congress did not intend there to be one.[22]

C. THERE IS NO PERSUASIVE REASON WHY THE SUSPENSION POWER SHOULD NOT APPLY TO INITIAL RATES

Petitioners advance a number of arguments that are designed to show that it is unnecessary or unwise to

[22] Petitioners argue (Br. 28) that the Federal Power Commission ruled that it was without authority to suspend initial rates, and that this decision is relevant to the issues of the present case. But a dispositive difference between the statutes explains the apparent discrepancy. Under Section 205(d) of the Federal Power Act, as added, 49 Stat. 851, 16 U.S.C. 824d(d) and under Section 4(d) of the Natural Gas Act, 52 Stat. 822, as amended, 15 U.S.C. 717c(d), no change may be made in any rate except on 30 days' notice, to "be given by filing * * * new schedules stating plainly the *change or changes* to be made in the schedule or schedules *then in force*" (emphasis added). Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), and Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), give the Federal Energy Regulatory Commission authority to suspend "such new schedule[s]." Thus the suspension authority apparently extends only to "such new schedule[s]," *i.e.*, schedules stating changes "to be made in the schedule or schedules then in force." This authority is therefore inapplicable to initial schedules (which do not change schedules already in force) and the former Federal Power Commission's ruling to that effect is of no help to petitioners. Moreover, the Federal Energy Regulatory Commission has not yet decided to follow the old Power Commission's construction of its authority, and, if the new Commission should conclude that it may suspend initial rates, the disparity perceived by petitioners would vanish.

suspend initial tariffs. These arguments may be appropriate for a legislative forum, but they do not detract from the fact that Section 15(7) authorizes the suspension of initial rates. In any event, the objections are unpersuasive.

1. The availability of reparations does not make suspension inappropriate

Judge Roney, dissenting on the court of appeals, argued (A. 762a–771a) that, because the Commission could order the refund of charges collected under what ultimately may be found to be excessive rates, it should not have suspended the rates. To suspend, Judge

Roney argued, exposes the carrier to a risk of irreparable loss (because it cannot recoup if the suspension should prove to have been unnecessary) while offering no benefit to shippers. Petitioners echo this argument (*e.g.*, Br. 24).

This argument offers no reason to distinguish between initial rates and changed rates; the Commission may order a refund or the shippers may seek reparations in either case if the charges are found to have been unjust or unreasonable[23] and in either case the suspension irreparably denies revenues to the carriers. The argument therefore offers no support to petitioners, who concede (as they must) that changed rates may be suspended and argue only that initial rates are different. More than that, however, this argument simply ignores the conclusion of Congress that reparations often are insufficient to undo the damage caused by overcharges. That, after all, is why Congress authorized the Commission to suspend rates. *Chessie, supra,* 426 U.S. at 512–513 and n. 10.[24] As the court of appeals concluded (A. 757a):

> Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection [*i.e.*, the suspension power] is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

[23] See Sections 8 and 9 of the Act, 49 U.S.C. 8 and 9.

[24] Cf. *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 524 ("the possibility of refund does not afford sufficient protection"); *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 ("experience has shown [the protection of refunds] to be somewhat illusory").

This case illustrates why the suspension power may serve interests other than protecting the short-run financial welfare of shippers. The price of North Slope oil, as delivered to refineries, is fixed by the price of oil in the world market (see Br. 8 n. 9). This means that the wellhead value of Alaskan crude goes down as the pipeline transportation charge goes up. Moreover, the owners of the pipeline are subsidiaries of the shippers of the oil (see pages 7–8 and n. 4, *supra*); in practical effect, then, the shippers are charging themselves for the transportation. Because of these circumstances, neither the shippers (the parent companies of petitioners) nor the consumers have a direct interest in the rates for transportation.[25]

But the cost of transportation may be a formidable obstacle to the development of new oil. Because high transportation costs decrease the value of the oil itself, they make it less attractive to explore for or produce oil. The Commission found that "the maintenance of excessively high rates could act as a deterrent * * * to the use of the pipeline by non-affiliated oil produc-

[25] No North Slope oil producer protested the tariffs filed by petitioners, and none has intervened in the judicial proceedings.

ers" (A. 627a), and excessive charges could delay the development of much-needed energy. The cost of transportation also affects the State of Alaska and the Arctic Slope Regional Corporation (see page 25, *supra*), because it converts oil revenues (which are taxed and subject to royalties) into transportation revenues (which are not).

Reparations to shippers would do little to overcome damage done to these interests. Indeed, because of the near-identity of interest between shippers and carriers, the shippers might not even seek reparations if the rates were found to be excessive; any reparations could be taxed or subject to royalty payments to the State of Alaska, while the same money in the hands of the carriers would not be taxed or subject to royalty. We do not suggest that the possibility of reparations is useless, but it is not enough to provide the protection that Congress concluded was necessary.

2. Suspension of initial rates does not prevent the provision of new service

Petitioners make much of the fact that suspension of a changed rate simply preserves the *status quo* (*e.g.*, Br. 15–16, 18, 22–24, 32–33). Suspension of an initial rate, they contend, has a much more dramatic effect: it prevents the transportation service from operating at all. Petitioners urge that this difference calls for different treatment of initial and changed rates under Section 15(7).

This argument overlooks the fact that initial rates of motor carriers are suspended under language identical in all material respects to that of Section 15(7) (see pages 28–34, *supra*). Although it might be possible to distinguish between initial rates and changed rates because of the supposed difference to which petitioners refer, the fact remains that Congress did not do so.

Petitioners' argument fails for other reasons as well. Non-operation of a new service, like operation of an old service at existing rates, is the *status quo ante;* it is misleading to say that suspension of a changed rate "preserves" the *status quo* while suspension of an initial rate has some different effect. In either event, the suspension frustrates the desire of the carrier to charge a particular rate and leaves things as they were. In some cases, indeed, the suspension of a proposed increase in the rate for an existing service might leave that service unprofitable and cause the discontinuation of the existing service.

Most importantly, however, this case demonstrates that the suspension of a proposed initial tariff does not mean that the proposed service cannot operate at all. The suspension is based on the conclusion that a particular proposed rate is probably excessive, not on a conclusion that the proposed service should not be offered. The Commission therefore allows the carrier to refile a tariff with rates that do not appear to be excessive. Once this has been done, the service may be offered. Petitioners have other objections to the procedure under which the Commission informed them that some rates would not appear to be excessive; we discuss these objections at pages 44–51, *infra*. But the

point is that petitioners cannot argue that the suspension of initial rates amounts to a prohibition against the offering of a new service. The premise of petitioners' argument is incorrect, and its conclusion therefore is unsupported.

D. THE COMMISSION'S CONSISTENT EXERCISE OF THE POWER TO SUSPEND INITIAL RATES IS ENTITLED TO DEFERENCE

If there is any doubt about the power to suspend initial rates, that doubt should be dispelled by the Commission's exercise of that power for several decades, by Congress' disinclination to deprive the Commission of that power, and by the deference traditionally accorded to an agency's consistent interpretation of the statute it administers.[26]

The Commission consistently has held that the phrase "new * * * rates" in Section 15(7) includes "both changed and initial" rates. *Rail-Water, Grain in Bulk, Mo., Ill., and Ind. to Buffalo,* 321 I.C.C. 564, 566. The Commission first suspended an initial rate no later than 1918; in *Cotton from New Orleans,* 49 I.C.C. 751, the Commission suspended a tariff that "proposed * * * to establish on file with us for the first time port-to-port rates from New Orleans to New York" for certain commodities (*id.* at 751). As a result of the suspension, "the situation was continued

[26] See, *e.g., National Labor Relations Board* v. *Enterprise Association,* 429 U.S. 507, 528; *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 381; *Udall* v. *Tallman,* 380 U.S. 1, 16; *Massachusetts Trustees* v. *United States,* 377 U.S. 235, 241–245; *United States* v. *American Trucking Associations,* 310 U.S. 534, 549.

whereby no port-to-port rate was on file with us" (*id.* at 752).

The Commission, recognizing that the rates in issue were "initial rates, not increased rates" (*id.* at 753), expressly rejected an argument, like the one advanced here by petitioners, that the rates were not "new" within the meaning of the statute and that the Commission's "suspension power is limited to an increase in rates previously on file and subject to its jurisdiction" (*id.* at 752). The Commission held, to the contrary, that "new" rates include initial rates, that the rates at issue were "new rates in the sense that respondent had not previously filed its port-to-port rates with the Commission," and therefore that "[t]he Commission's jurisdiction over these rates * * * is clearly full and complete" (*ibid.*).[27]

The Commission has never departed from this straightforward assertion of power to suspend initial rates under Section 15(7),[28] and its assertion of authority therefore is entitled to "great deference." *Udall* v. *Tallman,* 380 U.S. 1, 16.[29]

[27] Mr. Justice Black recognized that the Commission's decision in that case involved "initial rates." *Chicago & Eastern Illinois R.R.* v. *United States,* 375 U.S. 150, 158 (dissenting opinion).

[28] See also *Bituminous Coal Via Motor-Rail from Lynnville, Indiana to Chicago, Illinois,* 313 I.C.C. 573 (suspension of initial motor-rail rate under both Section 15(7) and Section 216(g)); *Machinery from Salt Lake City—International Transport, Inc.,* 304 I.C.C. 286. Other cases are collected at Alaska Br. 48–52.

[29] Petitioners mistakenly rely (Br. 27) on *Restriction in Routing between Greenwood and Augusta,* 165 I.C.C. 3, affirmed *sub nom. Atlantic Coast Line R.R.* v. *United States,* 48 F. 2d 239

II

THE COMMISSION HAS THE AUTHORITY TO TELL CARRIERS THAT IT WILL NOT SUSPEND INTERIM RATES THAT DO NOT EXCEED A PARTICULAR LEVEL

If the Court holds, as we have argued above, that the Commission may suspend initial rates, then it also must consider petitioners' argument (Br. 32–42) that

(W.D. S.C.), affirmed, 284 U.S. 288. The issue in that case was not whether an initial rate is a "new" rate. Indeed, the focus was on a different portion of Section 15(7)—that which empowers the Commission to suspend a schedule stating a "new * * * regulation or practice affecting any rate, fare, or charge." The Commission viewed all the schedules at issue as stating "new regulation[s] or practice[s]"; it found that it was without jurisdiction to suspend some of the schedules, however, because they did not affect "any existing rate, fare, or charge" (165 I.C.C. at 4). Insofar as the decision bears upon the present case at all, it supports rather than contradicts the Commission's long-standing interpretation that "new" rates embrace initial ones.

In re Wharfage Charges of the Galveston Wharf Co., 23 I.C.C. 535, also cited by petitioners (Br. 27), does not support their position. The carrier in that case, after operating for some years in the mistaken belief that it was not subject to the Act, prepared and filed its initial tariff schedules. Other parties protested and asked the Commission to suspend the schedules. The Commission declined to do so, noting that suspension would leave the company with no lawful rates in existence and would oblige it either to cease operations or to violate the Act (23 I.C.C. at 537). The Commission did not state or imply that it was without power to suspend; on the contrary, it assumed that it had the power but simply determined not to exercise it under the circumstances presented.

The other Commission decisions to which petitioners point (Br. 27 n. 38) have nothing to do with the power to suspend initial

the Commission exceeded its authority by telling the carriers that, if they proposed interim rates less than a particular level, it would not suspend those rates. We submit that petitioners' arguments in this respect are incorrect.

A. THE COMMISSION MAY ANNOUNCE THAT IT WILL NOT SUSPEND PARTICULAR RATES

There is a short answer to petitioners' labored argument that the Commission may not announce that it will not suspend tariffs proposing rates lower than a specified level.

The reason for giving the Commission the power to suspend is that it may be necessary to prevent certain rates, which appear to be excessive, from going into effect. The foundation for a suspension is the Commission's conclusion that the proposed rate appears to be unjust or unreasonable. The Commission's decision to suspend particular rates as apparently too high implies that other rates would not be too high. The Commission must form at least a tentative view about where the line between "too high" and "not too high" appears to be. Section 15(7) requires the Commission to give reasons for suspending a schedule of rates. One compelling reason is that the proposed rates are on the high side of the line tentatively identified; the Commission's statement of reasons is made

rates. Petitioners' strained reading of dicta in those decisions does not support their contention that the Commission viewed itself to be powerless to suspend initial rates.

more complete if it identifies where the apparent dividing line is.[30]

That is all the Commission did here. It told the carriers where one line between excessive and reasonable rates might be, based on its preliminary study, and it told the carriers that if they filed rates no more than that amount, it would not suspend them.[31] Petitioners' real complaint, then, is that the Commission exposed *too much* of its reasoning process and complied too completely with the requirement that it state reasons for its decisions.

The Commission could, of course, have remained silent concerning the interim rate level it would find acceptable. If it had, petitioners would have been required, if they wished to commence operations during the suspension period, to speculate about the maximum rates the Commission would allow to take effect. That speculation might have led to multiple refilings and successive suspensions until petitioners

[30] The statement of reasons need not be as elaborate as it was in this case. See *Port of New York Authority* v. *United States*, *supra*, 451 F. 2d at 786 n. 16; Pet. Br. 33 n. 49. But because of the importance of TAPS, the Commission concluded that it should state its reasons as completely as possible and specify the line it had tentatively identified.

[31] Nothing in the statute prohibits any carrier from filing a new tariff containing lower rates after a previous tariff has been suspended. Cf. Section 6(7) of the Act, 49 U.S.C. 6(7). Petitioners seem to contend (Br. 36) that the Commission was forced to decide between suspension with no possibility of refiling and no suspension at all. But the statute does not create an all-or-nothing choice, as the court of appeals recognized (A. 759a–760a). See also *Chessie*, *supra*.

finally hit upon an acceptable rate level. See, *e.g.*, *Clay From Greybull, Wyo., to Points in the Middle West,* 314 I.C.C. 705. That time-consuming exercise would have been both pointless and contrary to Congressional policy, which favors "[t]he early development and delivery of oil * * * from Alaska's North Slope to domestic markets." 43 U.S.C. (Supp.V) 1651(a).

In order to avoid the prospect of cascading tariff filings, and to be as explicit as possible concerning the reason why (and extent to which) it believed petitioners' original rates to be excessive, the Commission simply stated in its order the rate levels that, if filed, it would allow to go into effect without suspension during the seven-month period (A. 638a). The Commission's reasonable action should not expose it to petitioners' present charge of usurpation of power.

Even if the Commission had not specified acceptable interim rate levels—*i.e.*, ones that it would not find to be probably unlawful—its statement of reasons for suspending petitioners' original schedules necessarily would have suggested the acceptable interim rate levels. It would have taken only a simple computation to make the necessary determination.

B. THE COMMISSION'S ANNOUNCEMENT THAT IT WOULD NOT SUSPEND PARTICULAR RATES IS NOT UNAUTHORIZED "RATEMAKING"

Petitioners argue that the Commission's procedure here amounted to "ratemaking" that was conducted without the statutory requirement of full adversarial hearings. This argument fails at the threshold, be-

cause no rates have been "made." The Commission simply told petitioners how best to take advantage of a procedure that is their statutory right—to file additional tariffs. The fact that the Commission may tell the carriers in advance that it will not suspend the tariffs does not make the invitation unlawful.[32] To the contrary, this Court sustained the validity of such an invitation in *Chessie,* describing it as "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation" (426 U.S. at 514). The Commission followed a "measured course * * * offer[ing] an alternative tailored far more precisely to the particular circumstances presented" (*ibid.*). See also *In re North American Light & Power Co.,* 170 F. 2d 924, 930–931 (C.A. 3); *Port of New York Authority* v. *United States,* 451 F. 2d 783, 785–786 (C.A. 2), both of which sustain similar decisions.

Petitioners confuse the prescription of rates, which is the final approval of rates as lawful after a hearing held pursuant to Section 15(1) of the Act, with the acceptance of a rate tariff, without a prior hearing but subject to a subsequent determination of lawfulness.

[32] Petitioners' unhappiness about the lack of a "hearing" prior to the Commission's suspension order (Br. 36–42) overlooks the purpose of suspension. It is designed to be a summary remedy, though a temporary one. It enables the Commission to act promptly on evidence less substantial than that necessary for the imposition of permanent rates. Section 15(7) sanctions this result by allowing the Commission to suspend a tariff "pending [a] hearing * * * concerning the lawfulness" of the tariff. Permanent rates will be set only after full hearing, which is now in progress and will continue for several months.

The Commission's suspension order, furthermore, was based on a considerable amount of data and argument from petitioners as well as from protestants. See generally App. 4a–577a and Volume III of the Appendix, which contains the oral argument and exhibits presented to the Commission prior to its order.

The Commission's acceptance of petitioners' interim rate tariffs was not a determination of the lawfulness of the rates set forth in those tariffs. To the contrary, the lawfulness of petitioners' rates will be determined only after investigation and hearing. The acceptance of rate tariffs pending a subsequent determination of lawfulness need not itself be preceded by a hearing. See Sections 6(1) and 15(7) of the Act. The fact that the tariffs accepted by the Commission were not petitioners' first choice does not alter the matter; as in *Chessie,* the Commission had authority to suspend one tariff and accept another without a prior hearing, subject to the protections offered by a subsequent hearing on the question of the lawfulness of the carriers' rates.

Petitioners rely (Br. 41–42) on *Moss* v. *Civil Aeronautics Board,* 430 F. 2d 891 (C.A.D.C.), but to the extent *Moss* purports to place general limitations on a regulatory agency's ability to use its suspension power to induce the filing of a modified rate tariff, it is inconsistent with this Court's subsequent decision in *Chessie.* In any event, the evil that concerned the court in *Moss* is not present here. In *Moss* the court suspected that a regulatory agency had connived, in *ex parte* meetings with members of the regu-

lated industry, to implement a significant revision of the agency's overall practices with respect to the setting of permanent rates in a manner that would effectively insulate those rates from any judicial inquiry into their lawfulness. See 430 F. 2d at 893–894, 900–902. In contrast, in this case there is no suggestion that the interest of the public has been subordinated to that of the regulated industry as a result of *ex parte* dealings; only temporary rates have been authorized, and once permanent rates are fixed they will be subject to full judicial review. These facts would not invoke the *Moss* doctrine, which serves only to "[extend] judicial power where an agency is using the suspension authority so as to avoid or limit the judicial review provided by Congress * * *." *Continental Air Lines, Inc.* v. *Civil Aeronautics Board,* 522 F. 2d 107, 131 (C.A.D.C.) (Leventhal, J., concurring).[33]

The "coercion" of which petitioners complain (Br. 41) flows, if at all, not from the Commission's statement of the maximum interim rates it would accept without suspension but from the suspension itself. Whatever economic compulsion petitioners may have

[33] The procedure the Commission followed here resembles the practice of the Civil Aeronautics Board following *Moss*. After the Board entered the orders that gave rise to *Moss*, it instituted a general inquiry into airline ratemaking. Orders 70–1–147, 70–1–148, 70–2–121, *Civil Aeronautics Board, Domestic Passenger Fare Investigation*, pp. 1, 7, 17, 673. In 1971 it issued an opinion and order holding that 12 percent is the maximum reasonable rate

felt to file interim tariffs,[34] they presumably would have felt just as strongly if the Commission had suspended the initial rates without indicating what interim rates it might find acceptable. The pressure petitioners perceived was the consequence of the statutory scheme and the financial demands that impelled them to begin transporting oil as soon as possible; it was not created by any unauthorized action of the Commission.

of return for carriers in their domestic passenger air service. Order 71–4–58, Phase 8—Rate of Return (April 9, 1971). The Board has since routinely suspended rates for domestic passenger service that produce returns in excess of 12 percent. See, *e.g.*, CAB Orders 77–6–109, 77–5–62, 76–6–173, Domestic Passenger-Fare Increase Proposed by Various Carriers; 76–5–93, Domestic Passenger-Fare Increase Proposed by Eastern Airlines, Inc. Likewise, the Commission here, through long practice, has established a rate of return standard that it enforced in this case by suspending rates that appeared to exceed that standard. See A. 633a–635a.

[34] Petitioners' assertion (Br. 8–9, 41) that they were threatened with criminal prosecution if they failed to file interim tariffs adopting the rates specified by the Commission is groundless. It was only after petitioners, at oral argument before the Commission, threatened to refuse to operate the pipeline if their initial rates were suspended that counsel for the Commission's Bureau of Investigations and Enforcement and the Department of Justice, in answer to questions raised by the Commission, pointed out that such a refusal might constitute an enjoinable violation of common carrier obligation or of the antitrust laws. Criminal prosecution was never suggested. See Transcript of Oral Argument 80, 119–121, 145–149, Exhibit 1 of Appendix. The Commission's suspension order did not address the question whether the carriers would have an obligation to file interim tariffs; its language was permissive throughout.

III

THE COMMISSION HAD AUTHORITY TO CONDITION ITS ACCEPTANCE OF INTERIM RATE FILINGS WITHOUT SUSPENSION ON THE CARRIERS' AGREEMENT TO REFUND ANY CHARGES IN EXCESS OF THE LEVELS ULTIMATELY FOUND TO BE JUST AND REASONABLE

The Commission recognized that "even the lower interim rate levels [that it was willing not to suspend] may prove upon investigation to exceed reasonable levels" (A. 636a). It therefore conditioned its willingness to accept the filing of interim rate schedules without suspension on a "require[ment] that the carriers keep account of the amounts collected under the interim rates or the proposed rates should they become effective and that they agree to refund any portion of such amounts that may ultimately be established as excessive" (*ibid.*).[35]

Petitioners argue that the Commission could not lawfully ask them to agree to this condition because the statute does not expressly authorize the Commission to enter refund orders with respect to initial rates (Br. 42–46). The court of appeals, relying on this Court's decision in *Chessie,* which specified the manner in which certain revenues were to be spent, correctly rejected this contention (A. 760a–761a).

The willingness of carriers to agree to refund charges ultimately found to have been excessive may

[35] As the court of appeals noted, "if the Commission does not complete its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect" (A. 760a n. 15). See A. 628a.

bear directly on the reasonableness of the Commission's decision to allow particular rates to go into effect without suspension. It allows the Commission to give carriers the benefit of the doubt. In the present case, for example, although the Commission concluded that a return of 10 percent on valuation would be fair, it was willing to allow the carriers to implement interim rates that were calculated on a rate base including the investment and cost claimed by the carriers (A. 635a, 646a). The Commission was faced with a choice; it could allow the carriers to collect only the rate that would produce no more than a 10 percent return on the rate base that might eventually be established as proper, or it could give them the benefit of the doubt and allow them to institute some higher rate calculated on their claimed costs. The latter course would be reasonable for the Commission to follow only if it could be assured that the carriers would refund any amounts determined to be excessive.

The Commission did not assert the power to impose a condition unrelated to the purpose of a suspension order. On the contrary, refund conditions are natural concomitants of suspension orders. Like suspension itself, they are designed to protect the public from the injury that results from unreasonably high rates.

Moreover, a self-executing refund requirement is particularly appropriate in the circumstances of this case for generally the same reasons that made suspension appropriate (see pages 38–39, *supra*). The shippers

are in large part affiliated with the carriers and the persons directly affected by unreasonably high rates include the holders of royalty interests and taxing authority. In the absence of a refund requirement, the carrier-affiliated shippers have little incentive to initiate separate reparations actions against the carriers with which they are affiliated, since a reparation order would divert revenues from the affiliated companies to holders of royalty and tax interests. Furthermore, it is not settled that the royalty owners and taxing authority could properly recover reparations in their own right. The Commission's refund condition, like its suspension order, was thus "tailored * * * precisely to the particular circumstances presented" and was a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation" (*Chessie, supra,* 426 U.S. at 514).

This Court has imposed similar conditions on its willingness to allow a suspended or enjoined rate to take effect pending disposition of litigation before the Court. For example, in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 409 U.S. 801, the Court stayed a district court's judgment enjoining the imposition of certain railroad charges that the Commission had declined to suspend. As a condition of the stay, the Court directed the affected railroads to keep account of pertinent amounts collected during the existence of the stay and, if the district court's order were ultimately affirmed, to make "refund (with

interest) of such amounts to persons in whose behalf such amounts were paid, without the necessity for such persons to make applications for refunds" (409 U.S. at 801–802).

Similarly, in the present case the Court conditioned its stay of the Commission's suspension order on "petitioners' agreement to keep account of the amounts collected under the proposed rates * * * and their agreement to refund any portion of the amounts collected under such rates by virtue of the stay which it is ultimately determined that they were not lawfully entitled to collect" (A. 784a).[36]

We do not suggest that the Commission's power to impose reasonable conditions on its acceptance of a rate filing without suspension is necessarily coextensive with this Court's power to enter orders in aid of its own jurisdiction. What these two cases illustrate, however, is that this Court, in circumstances like those in the present case, has determined that a refund condition, although not expressly authorized by statute, is an appropriate mechanism for minimizing the injury to the public that could result from allowing a possibly excessive rate to take effect.

Petitioners' principal objection to the refund condition seems to be that it allegedly departs from the

[36] The Court thereafter entered a more detailed order further effectuating the initial stay order (A. 785a–788a). The later order provides (A. 786a): "In the event certiorari is denied or it is otherwise ultimately determined that [petitioners] were not lawfully entitled to collect a portion of the rates so collected, the pipeline companies shall refund such portion of said rates, with interest * * * to the persons entitled thereto without further order of this Court."

statutory standard governing liability for reparations. The Commission's refund condition, according to petitioners, would require calculation of refunds solely by reference to the rate ultimately prescribed for the future, while the reparations standard under Sections 8 and 9 of the Act, 49 U.S.C. 8 and 9, would calculate damages by reference to the possibly different rate level that may have been just and reasonable during the present stages of the pipeline operation (Br. 44–46). In our view, petitioners are reading too much into the Commission's order.

Petitioners focus on the following language in the order: "The interim tariffs [should] contain a refund provision to the effect that if the rates charged exceed the rates subsequently authorized or prescribed * * *, the carriers will refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed" (A. 638a). Even if this language may be susceptible to the rigid interpretation that petitioners fear, there is no reason to assume that it will be applied so inflexibly. Indeed, elsewhere in the order, the Commission spoke more generally of the carriers' agreement "to refund any portion of such amounts [collected under the interim rates] that may ultimately be established as excessive" (A. 636a).

We agree with petitioners that the rate ultimately prescribed for the future will undoubtedly "bear a close relationship to the maximum rate that would have been lawful in prior periods, [but that] the two need not be the same" (Br. 45). Yet the refund obligation imposed by the Commission will not foreclose petitioners from attempting to demonstrate that, in the circumstances of this case, the two are in fact different, and that that difference justifies a somewhat higher rate for early stages of the pipeline's operation.

Petitioners' final argument (Br. 43–44) is that the Commission's requirement that they undertake to refund amounts they should not have collected is an "unconstitutional condition." It is not clear to what extent this doctrine is persuasive even in constitutional cases.[37] But petitioners have not been called on to surrender a constitutional right; they have no constitutional right to retain overcharges. They have simply been put to a hard choice. If they desire to collect rates that may eventually prove to be excessive, they must agree to pay back any amounts they should not have collected. The refund condition is no different in principle from the condition sustained in *Chessie*; it may make the prospect of collecting the rates less attractive to the carriers, but the condition is intimately related to the Commission's duty to as-

[37] See *Buckley* v. *Valeo*, 424 U.S. 1, 57 n. 65, 97–104, which holds that, although candidates have a First Amendment right to spend as much money as they please to promote their own candidacy, Congress may require them to surrender this constitutional right as a condition of receiving public funds with which to campaign. See also *Baxter* v. *Palmigiano*, 425 U.S. 308, 316–320; *McGautha* v. *California*, 402 U.S. 183, 208–220.

sess the reasonableness of proposed rates and to ensure that the funds are not improperly collected or retained.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. AND ARCO PIPE LINE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et. al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS THE STATE OF ALASKA AND THE ARCTIC SLOPE REGIONAL CORPORATION

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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS THE STATE OF ALASKA AND THE ARCTIC SLOPE REGIONAL CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (746a) is reported at 557 F.2d 775. The order of the Interstate Commerce Commission (623a), Investigation and Suspension Docket No. 9164 (Rate Filings) and No. 36611 (Rules and Regulations), June 28, 1977, will be reported at 355 I.C.C. 80.

JURISDICTION

The judgment of the court of appeals (772a) was entered on July 29, 1977. A petition for rehearing by BP Pipelines Inc. was denied on September 8, 1977 (774a). The petitions for writs of certiorari were granted on November 28, 1977 (789a). The jurisdiction of this Court rests on 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTES INVOLVED

The pertinent parts of sections 1, 8, 15(1), 15(7), 216(g), 307(g) and 406(e) of the Interstate Commerce Act, as amended, 49 U.S.C. §§ 1, 8, 15(1), 15(7), 316(g), 907(g), 1006(e) are set forth in the appendix to this brief.

QUESTIONS PRESENTED

1. Whether, upon a showing of probable unlawfulness of the rates, the Interstate Commerce Commission had the power under section 15(7) of the Interstate Commerce Act to suspend for seven months, pending investigation, initial rate schedules for the transportation of crude oil by pipeline.

2. Whether the Commission, by advising the carriers in its suspension order of the maximum rates it would accept without suspension and allowing them to file such interim rates to be effective during the suspension period, prescribed rates within the meaning of section 15(1) of the Act, which requires a full hearing.

3. Whether the Commission was empowered to condition its acceptance, without suspension, of a carrier's interim rate filing on the latter's agreement to refund any charges thereafter found, after a full hearing, to exceed just and reasonable rate levels.

4. Whether the Commission's suspension order, which was issued after consideration of extensive economic data and oral argument before the Commission, and allowed the carriers to file interim rates based on their own cost data and an above-standard rate of return, violated the carriers' rights under the due process and just compensation clauses of the Fifth Amendment.

STATEMENT

These cases involve the authority of the Interstate Commerce Commission to issue an order (623a) suspending for the seven-month statutory period, pending an investigation now under way, the initial rate schedules filed by the four petitioner-pipeline owners and four other pipeline owners [1] upon a showing of probable unlawfulness of their rates. The eight companies proposed to operate as common carriers of crude oil over the Trans-Alaska Pipeline System ("TAPS"), a 48-inch line extending some 800 miles from the Prudhoe Bay oil field on the Alaskan North Slope to a terminal in Valdez, Alaska, a line in which the companies own undivided interests. (136a-37a, 189a, 319a.) Oil-pipeline common carriers are subject to regulation under part I of the Interstate Commerce Act, 49 U.S.C. §§ 1-27.[2]

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[1] Three of the other four pipeline owners, Amerada Hess Pipeline Corp., Sohio Pipe Line Co. and Union Alaska Pipeline Co., intervened in the court below and are parties here. The fourth, Phillips Alaska Pipeline Corp., which is not a party here, challenged the Commission's action in the District of Columbia Circuit. *See* Pet. Br. 4 & n.2.

[2] As of October 1, 1977, jurisdiction under the Interstate Commerce Act over the transportation of oil by pipeline was transferred from the Interstate Commerce Commission to the Federal Energy Regulatory Commission ("FERC"). (Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, enacted August 4, 1977; Executive Order 12009, 42 Fed. Reg. 46267 (1977).) The full investigation of TAPS rates ordered by the ICC is continuing before FERC.

Background

The construction of TAPS followed the discovery in 1968 of the main Prudhoe Bay field, which contains over 9 billion barrels of recoverable petroleum, as well as much recoverable natural gas.[3] The Prudhoe Bay field was described by the Federal Power Commission in 1977 as containing "the largest accumulation of oil and gas ever discovered on the North American Continent." (136a.) It is estimated by the U.S. Geological Survey that the undiscovered recoverable resources of North Alaska include about 20 billion barrels of oil. (40a.)

Following a period of litigation involving environmental issues,[4] which was ultimately resolved by an act of Congress,[5] construction of TAPS began in April 1974 and was completed in June 1977.[6] Its design capacity is 1.2 million barrels per day (and is expandable to 2 million barrels). (147a, 189a.) The owners initially forecast a construction cost for TAPS of just under $1 billion. (10a, 86a, 117a, 140a.) As it turned out, according to data submitted by them to the Commission, the final aggregate cost to the eight pipeline companies was approximately $9.27 billion, consisting of nearly $8 billion in capital expenditures and well over $1 billion in capitalized construction interest and overhead costs. (10a, 86a, 140a, 187a-88a, 640a.)

[3] The pipeline companies advised the Commission that they are using the figure of 9.5-9.7 billion barrels of known recoverable oil reserves. (39a.)

[4] *See, e.g., Wilderness Soc'y* v. *Morton*, 479 F.2d 842 (D.C. Cir. 1973) (en banc), *cert. denied*, 411 U.S. 917 (1973); *Alyeska Pipeline Service Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975).

[5] Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651 *et seq.*, 30 U.S.C. § 185(r), Pub. L. No. 93-153, 87 Stat. 584, enacted November 16, 1973. The Act required that TAPS, like other pipelines constructed across federal lands, "be constructed, operated, and maintained as [a] common carrier," (30 U.S.C. § 185(r)(1)), and it authorized the Secretary of the Interior, whenever he has reason to believe that a pipeline owner or operator is not operating in accord with "its obligations as a common carrier," to "request the Attorney General to prosecute an appropriate proceeding before the Interstate Commerce Commission or Federal Power Commission. . . ." (30 U.S.C. § 185(r)(5)). *See also* 119 Cong. Rec. 22797 (1973) (remarks of Senator Jackson).

[6] The owners acted through their joint agent, Alyeska Pipeline Service Company, which will also operate the pipeline. (136a.)

The size of the ownership interests in the pipeline held by the eight companies varies widely—from Sohio Pipe Line's 33.34 percent interest to the 1.50 percent held by Amerada Hess Pipeline (*see* table, p. 6, *infra*). (749a.) Sohio Pipe Line and BP Pipelines (15.84%) are affiliated by virtue of a 1970 merger agreement involving their parent companies (*see* n. 7 in the margin).

Each of the pipeline owners (except for Union Alaska) is affiliated with an oil company that is a major producer in the Prudhoe Bay field,[7] and there exists a substantial identity of interest between pipeline ownership and ownership of the oil production from the field. Pipeline-

[7] Although petitioners deny here that petitioner BP Pipelines is "directly affiliated" with any company engaged in production of North Slope Oil (Pet. Br. 5), the verified statement of their consultant, R. Gary, which they have lodged with the Clerk (Pet. Br. 6 n.6), states:

> British Petroleum is an affiliate of The Standard Oil Company (Ohio) ("Sohio"), having merged its United States holdings, including its Prudhoe Bay leases, into Sohio in 1970 in exchange for an approximate 25% common stock interest in Sohio, which is rising to a maximum of approximately 54% as Sohio's Prudhoe Bay oil production increases. British Petroleum also retains a net profits interest in Sohio's net Prudhoe Bay oil production above 600,000 barrels per day and owns other North Slope leases not contributed to Sohio in the merger transaction. . . . [T]he parent companies of BP Pipelines and Sohio Pipe Line entered into an agreement in mid-1974 providing that BP Pipelines would acquire a 15.84% undivided interest in TAPS from Sohio Pipe Line in order to facilitate the financing of the System. [Verified Statement at 11-12.]

ownership and present field-ownership interests are as follows:[8]

Company	Percentage of Pipeline Ownership	Percentage of Production Ownership
Sohio Pipe Line Co./ Standard Oil Co. of Ohio [an affiliate of British Petroleum]	33.34%	53.16%
BP Pipelines Inc.	15.84	—
ARCO Pipeline/Atlantic Richfield Co.	21.00	20.27
Exxon Pipeline/Exxon Corp.	20.00	20.27
Mobil Alaska Pipeline/ Mobil Oil Corp.	5.00	2.09
Phillips Alaska Pipeline/ Phillips Petroleum Co.	1.66	2.05
Amerada Hess Pipeline/ Amerada Hess Corp.	1.50	0.54
Union Alaska Pipeline	1.66	—
Other Producers	—	1.62
	100.00%	100.00%

As a consequence of this identity of interest, any excess charges paid by the oil companies, as shippers, for transportation of their oil via TAPS are received for the most part by their own pipeline-company affiliates.

The level of TAPS rates has a direct and substantial economic impact on respondents the State of Alaska and the Arctic Slope Regional Corporation ("Arctic Slope").[9] The State of Alaska under its leases owns a one-eighth

[8] 749a; Pet. Br. 6 n.6 (adjusted to exclude the State of Alaska's royalty interest).

[9] These respondents are hereinafter collectively referred to as "the Alaska parties."

royalty interest in the Prudhoe Bay oil and is thus entitled to 12½ percent of the value of the oil where it enters the pipeline ("wellhead value"). (749a. *See* Pet. Br. 7 n.8.) Since the wellhead value is in substance the market price less the cost of transportation, there is an inverse relationship between wellhead value and the cost of TAPS transportation—*i.e.*, the lower the pipeline charges, the higher the wellhead value of the oil. (554a, 749a. *See* Pet. Br. 7 n.8.) In addition, the State has enacted a severance tax of 12¼ percent based on wellhead value.[10] Taken together, the State's royalty and maximum severance-tax interest amounts to 23.2 percent of wellhead value. Because of the inverse relationship between transportation costs and wellhead value, each dollar by which the TAPS rate exceeds a just and reasonable level results in the unjustified loss of about 23 cents to the State of Alaska.[11]

Arctic Slope is one of thirteen regional corporations established pursuant to the Alaska Native Claims Settlement Act ("ANCSA")[12] to administer assets received by Alaskan Natives in return for extinguishment of their aboriginal land claims, including the Arctic Slope Eskimos' claim to Prudhoe Bay.[13] As compensation for

[10] Alaska Statutes, §§ 43.55.011, .012, .013, .016, .017, .020, .030, .140 (effective July 1, 1977). *See* 749a. The severance tax of 12.25% is not applied to the 12.5% royalty interest held by the State of Alaska, thus giving the State a maximum severance-tax interest of 10.72% of wellhead value.

[11] At an assumed throughput of 1.2 million barrels per day, the State would lose about $1 million annually for each *penny* that the TAPS rate exceeds a just and reasonable level.

[12] 43 U.S.C. §§ 1601-1627, 85 Stat. 688 (1971).

[13] Prior to the enactment of ANCSA in 1971, the Inupiat Eskimos had claims of unextinguished aboriginal title based on use and occupancy since time immemorial to the entire Arctic Slope of the State of Alaska. Other Native people of Alaska (Eskimos, Aleuts, and Indians) had similar and substantial claims to other areas of the State. (112a-13a; 728a-31a.)

extinguishment of these claims, the Alaskan Natives received fee title to approximately 40 million acres of land plus a cash settlement of $962.5 million to be paid over a period of years. Of this amount, $462.5 million will be paid by the United States from appropriated funds. The remaining $500 million is to be paid from revenues derived from a 2 percent royalty on the wellhead value of all crude oil production in Alaska.[14] Arctic Slope and the other regional corporations receive 2 percentage points out of the State's 12½ percent royalty interest. (112a-16a, 728a-31a.)[15]

Proceedings before the Commission

Initial tariffs were filed by the eight TAPS carriers between May 27 and June 20, 1977,[16] to take effect be-

[14] 43 U.S.C. §§ 1605, 1606, 1608, 1610, 1611, 1613.

[15] As the owner or prospective owner of 5 million acres of potential oil-producing lands on Alaska's North Slope, the value of Arctic Slope's lands for oil development will also be affected by the level of TAPS rates. (115a.)

[16] Several months earlier the State of Alaska had asked the Commission to commence an investigation of TAPS rates in advance of the filing of initial tariffs, citing "the magnitude of the task and the shortness of time." (Emergency Petition of the State of Alaska for Investigation, ICC Docket No. 36536, March 8, 1977, p. 1. *See also* Petition of State of Alaska for Amendment of Rule 57(e), ICC Docket No. 36537, March 8, 1977.) The pipeline companies opposed this request as inconsistent with the statutory plan. Petitioner Exxon stated:

> When an *initial* tariff schedule for a newly constructed pipeline is filed, interested parties are given an opportunity to protest and petition the Commission for an investigation into *and/or a suspension* of the rates contained therein. 49 U.S.C. §§ 13(1), 15(7); 49 C.F.R. § 1100.42. In addition, the Commission may investigate *and/or suspend* the rate contained in an *initial* tariff schedule on its own motion. 49 U.S.C. §§ 13(2), 15(7). [Motion of Exxon Pipeline Company to Deny Emergency Petition of the State of Alaska for Investigation, ICC Docket No. 36536, March 28, 1977, p. 5 (emphasis added).]

The Commission denied the State's request as "premature." (ICC Order, Docket Nos. 36536, 36537, April 18, 1977.)

tween June 20 and July 1.[17] The proposed rates per barrel for transportation via TAPS were as follows 624a, 644a):

Amerada Hess	$6.44
ARCO	6.04
BP	6.35
Exxon	6.27
Mobil Alaska	6.31
Phillips Alaska	6.22
Sohio	6.16
Union Alaska	6.09
Composite Rate	$6.21

In a notice issued on June 2, 1977, the Commission requested each of the carriers "to submit a computation of the elements making up the determination of its proposed rate level immediately or as soon as possible, without waiting for the filing of protests to its tariffs." (1a.) A subsequent notice announced that, "[i]n view of the importance of the matter," the Commission would hear oral argument in the case on June 27. (2a.)[18] On June 15, protests and petitions for suspension were filed by both of the Alaska parties, the Department of Justice, and the Commission's Bureau of Investigations and Enforcement. (4a, 88a, 110a, 133a.)

[17] The filing of tariffs showing rates, fares and charges is required of oil-pipeline common carriers under sections 6(1) and (7) of the Act, 49 U.S.C. §§ 6(1), (7). Phillips Alaska filed its tariff on June 20, only 10 days prior to effectiveness and, at the Commission's request, extended the effective date until July 20. As a result, its tariff was dealt with in a separate Commission order, not the order under review. (*See* 749a.)

[18] This notice also reflected a decision by the Commission members to hear the case directly, rather than referring it to the staff suspension board and its appellate division of three Commissioners, as is routinely done in suspension cases. *See* 49 C.F.R. § 1100.200 (1976). (*See* 749a.)

The State of Alaska's protest (4a-87a) stated that the proposed rates—which would provide the carriers an estimated $2.7 billion in annual revenues (5a)—were unreasonably high.[19] The State cited the existence of substantial evidence that "[t]he TAPS construction project has been plagued by monumental cost overruns,"[20] but nonetheless assumed in its protest that the costs claimed by the carriers would be allowed in the suspension determination. (8a-12a.) The State presented data, however, challenging some of the assumptions and methods employed by the carriers, including their assumption in computing depreciation and amortization expense of only a 25-year life for the pipeline.[21] (12a-15a, 38a-44a.) In any case, the total of all claimed expenses incurred by the TAPS owners, the State showed, was only about $3.44 per barrel; and the difference between that figure and the composite proposed rate of about $6.20 was equity profit. (15a-18a.) Such excessive rates would not only "deter development of energy resources by producers other than the TAPS owners," but also "discourage maximum efficient use of the line even by owner-shippers and thus

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[19] The State's filing included a detailed "[p]reliminary analysis" of the tariffs prepared by an economic consultant. (54a-82a.)

[20] A voluminous report directed to this issue prepared for the Alaska Pipeline Commission was submitted with the protest. (*See* 9a, 83a-87a.) The Interstate Commerce Commission was also conducting its own independent audit of TAPS construction costs, having awarded a contract for this purpose to Touche Ross & Co. in October 1976. (8a, 138a.)

[21] That assumption, the State argued, was premised entirely on the main Prudhoe Bay field and failed to take account of other known oil pools in this field, as well as the sizable evidence that vast quantities of undiscovered recoverable oil exist in North Alaska (p. 4, *supra*). (38a-44a.) It further contended that "[t]he Commission's normal practice is to generally allow oil pipeline service lives of 35 years for crude oil trunk lines." (38a.)

The State also challenged the amounts of the carriers' claims for interest during construction, operating expenses other than depreciation and amortization, and interest expense. (12a-15a.)

would inhibit development of the oil resources in Alaska." (20a-21a.) The State urged the Commission to suspend the carriers' rates and to permit the filing of "maximum interim rates" (subject to a refund condition) of $3.59 to $4.42 per barrel. (5a-6a.)

Arctic Slope in its complaint (110a-32a) asserted that the capital expenditures claimed by the carriers may be attributable to "mismanagement and waste." (117a.) It also challenged a number of "erroneous factors and methods" employed by the carriers in their computations which, it argued, resulted in excessively high rates.[22] (112a, 118a-122a.) Such rates, by "drastically reduc[ing]" the wellhead price on which its royalties are payable, "would, in effect, postpone payment and thereby reduce the value of $500 million that Congress has determined to be owing to the [Alaskan] Natives."[23] (111a.) Also, the reduced wellhead price "would establish an entry barrier" to the development of other Alaskan oil reserves by other production companies, thereby "effectively negat[ing] the value of several million acres of Arctic Slope lands that Congress granted to Arctic Slope Eskimos in exchange for the Prudhoe Bay oil reserves. . . ." (11a-12a.) Arctic Slope urged the Commission to suspend the proposed rates and to permit the carriers to file substantially lower rates (between $3.04 and $3.44)

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[22] Arctic Slope pointed out that the 25-year life used to compute amortization of removal and restoration expense and also depreciation was too short; that the throughput assumptions were too low; that the substantial amount of capital generated by non-cash deductions was not considered; and that "[t]he use of reproduction costs for valuation is virtually unique to the Commission and results in pipeline companies realizing rates of return which significantly exceed rates permitted other public utilities." (119a-21a.)

[23] Arctic Slope estimated that at a $6.15 per barrel TAPS rate it would take 14 years before this sum would be repaid; at a rate $2 lower the repayment period would be only 9 years. (130a-32a.) The present value of the Alaskan Natives' royalty interest would be $45 million less at the higher tariff rate than at the lower. (130a.)

pending a final determination of the lawful rates. (123a-26a.)[24]

The protest filed by the Department of Justice (88a-109a) calculated that the proposed rates would result in overcharges of $700-$900 million annually. (95a.) "Unreasonably high transportation rates," the Department stated, "discourage exploration and development of new fields by reducing the wellhead value of crude, thereby decreasing returns on production. It would be inconsistent with national energy policy to permit rates to go into effect, such as those proposed by the carriers, which would unnecessarily impair the discovery and exploration of new sources of crude oil." (95a.)

The final protest was filed by the Commission's Bureau of Investigations and Enforcement (133a-215a), which viewed the proposed rates as "prima facie unreasonable." (143a.) Like the Alaska parties, the Bureau cited the "enormous cost overruns connected with the construction of TAPS [which] in themselves require the entry of an order of investigation" and urged that "no rate should receive even the tacit approval of this Commission until it has thoroughly considered the full record regarding the cost overruns."[25] (138a-41a.) The Bureau supported the position of the Alaska parties that the 25-year life for the pipeline assumed by the carriers in computing depre-

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[24] In urging suspension, Arctic Slope pointed out that "[t]he principal reason to favor the carrier in an ordinary suspension proceeding is the carrier's inability, retroactively, to recover upward adjustments from the shipper. However, in these proceedings, if the final tariff were to be adjudicated at a higher rate than the initial tariff, most of any profits lost by the companies from their pipeline operations would be recouped by their production operations." (124a.)

[25] In this connection, the Bureau discussed the Touche Ross audit of TAPS construction costs (n.20, p. 10, *supra*) and stated that the auditor's work was "being frustrated and delayed" by the pipeline companies. (141a-43a.)

ciation expense and removal and restoration costs was too short, pointing out that various independent studies of TAPS projected a substantially longer life. (152a-55a.) It concluded that suspension of the proposed rates was required and that pending investigation the carriers should be allowed to file (subject to a refund condition) "proper rates," which the Bureau computed at $4.54 to $5.00. (143a, 151a-52a, 161a-64a.)

One major rate issue, which was emphasized in several of the protests and became the focus of subsequent argument before the Commission, involved the carriers' treatment of interest expense in constructing their proposed rates. According to the carrier data submitted, the aggregate debt/equity ratio in financing TAPS was approximately 85%/15%. (23a-24a, 159a, 640a.) In calculating their rates, the carriers deducted interest expense in the computation of net income (*i.e.*, treating it as an "above-the-line" item) and then added a return element sufficient to provide them with a 7 percent return on total investment (*i.e.*, both the portion of the investment represented by equity and the portion represented by debt). (632a; p. 14, *infra*. *See, e.g.*, 334a-35a). This "double-dipping" procedure, the protestants showed, not only resulted in unreasonably high returns on equity but was also contrary to the Commission's past practice in oil-pipeline ratemaking, which treated interest as an element to be recovered in the return only. (26a, 29a-30a, 118a-19a, 155a-61a.)[26]

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[26] *See Reduced Pipeline Rates and Gathering Charges*, 243 I.C.C. 115, 148 (1940) and the ICC Bureau's explanation at 157a-58a; *Petroleum Products, Williams Brothers Pipe Line Co.*, 355 I.C.C. 479, 491 (1976); Initial Decision, *Charge for Terminalling and Storage, Kenai Pipeline*, ICC Docket No. 36244, served July 20, 1976, p. 4 ("[I]nterest should not be included as an expense item for the purpose of the present proceeding. However, the rate of return is expected to cover serving of debt.")

On June 22 the pipeline companies filed extensive responses to the protests. (251a-537a, 545a-77a.) They did not oppose an investigation of their rates (*e.g.*, 322a, 401a), but challenged the Commission's authority as a matter of law to grant the suspension relief requested in the protests and argued that the proposed rates were both reasonable and computed in accordance with accepted practice.[27]

On June 27 the nine-member Commission heard a full day of oral argument. (App. (Vol. III), Exs. 1-3.) In addition to issues of law, much of the argument related to the appropriate treatment of interest expense. The carriers' methodology, it became clear, was premised on a 1941 consent decree in a proceeding brought by the Department of Justice under the Elkins Act:[28]

> Commissioner O'Neal: You are seeking 7 percent on the total valuation plus interest?
>
> Mr. Jordan [counsel for the carriers]: Well, we're seeking 7 percent return on valuation and before we calculate what that return is—what the net income figure is—we have taken out interest as an expense element. Just along with operating expenses and other forms of expenses, we have taken interest on debt.
>
> We tune to that 7 percent figure in the consent decree and that is our understanding of the methodology. [App. (Vol. III), Ex. 1, pp. 177-78.]

[27] The responses of petitioners Exxon and Sohio made clear that if interest is excluded as an above-the-line expense (as protestants showed was the Commission's practice), their return on total valuation under the proposed rates would be 12.25 and 12.9 percent, respectively (357a, 566a)—which far exceeds the 8 percent return on valuation that the Commission has permitted in prior cases involving crude oil pipelines (*see* 633a).

[28] *United States* v. *Atlantic Ref. Co.*, C.A. No. 14060 (D.D.C. 1941). This decree placed a limitation of 7 percent of valuation on the dividends which oil company-owned pipelines could pay to their shipper-owners without such payments constituting unlawful rebates. (625a, 632a-33a.)

Although the carriers argued (as they did in their responses) that this treatment of interest expense was the same as that employed by the Commission when it transmitted certain oil-pipeline data to the Congress (*e.g.*, *id.* at 14-15), counsel for the ICC Bureau showed that the data in question was simply transmitted in alternative formats—"In Schedule A interest expense is not deducted from net income. In Schedule B interest expense is deducted from net income"—and that "in every contested case that has been before this Commission" interest has been recovered in the return on valuation only. (*Id.* at 204-05, and Ex. 2 at Ex. 8; *see* n.26, p. 13, *supra.*)

The oral argument also dealt with the equities involved in the Commission's determination whether or not to suspend. In this regard, the Alaska parties pointed out that they would not be made whole by either a refund condition (which the carriers had agreed to accept if the Commission did not suspend) or reparations. They cited the irreparable injury resulting from delay in the receipt of funds needed for the State's ongoing budget and program obligations, including postponement of programs involving secondary education and rebuilding of fisheries for Alaskan Natives, and also from delaying the programs for which the Alaskan Natives' cash settlement would be used. (*Id.* at 139-44, 193, 200-01.)[29] The Department of

[29] As counsel for Arctic Slope stated without contradiction (App. (Vol. III), Ex. 1, pp. 140, 143-44, 200-01):

> Now, right now, under court order, the state of Alaska is obligated to some $60 million to provide secondary education for Alaskan natives.
>
> There is another $50- to $100- to $120 million—which the state is obligated to put into rebuilding the fisheries which, by federal law, were a part of the resources of the native people until very recently.
>
> * * *
>
> The time for the action in Alaska is now. The native corporations are struggling to establish themselves right now to develop their resources, provide basic education and that type of thing

Justice stated that "the United States, the people of the United States, would be hurt, because for as long as those high, inefficient, excessive tariffs are in effect, development of other oil resources on the north slope would be delayed. . . . And there is no way of refunding time." (*Id.* at 122.)[30] Also, the ICC's Bureau pointed out that the effect of a suspension order on the oil company-pipeline

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for their people today, and a three- or four-year deferral simply—with inflation and the other things, the cost of living and development in Alaska such as they are—a many-year deferral with a refund provision at the end of that time is not going to make it whole.

Children who go for three or four years without a high school in their town and who have to spend nine months of the year in another city will not be compensated by a refund provision that gives them a high school four or five years from now.

* * *

The incredible impact on the State of Alaska's budget will be felt immediately and irreparably by Alaska natives. The schools and the restoration of the fisheries, which the State of Alaska is legally obligated to pay for and provide to Alaska natives, will obviously not happen if Alaska is waiting for some time in the future for a refund. [Emphasis added.]

[30] The Department of Justice's position is noteworthy in light of Mr. Justice Brennan's expressed concern, in his dissent from the Court's stay of the Commission's suspension order, as to the impact of a stay upon the "ultimate consumers of oil" shipped via TAPS. (787a.) While it is convenient for purposes of discussion here to view the domestic U.S. market price as a constant (*see* Pet. Br. 8 & n.9), the interests of American consumers may nonetheless be affected by the suspension *vel non* of the carriers' rates. As the Department of Justice suggested, unreasonably high TAPS rates, even over a period of months, may discourage or delay development of Alaskan oil reserves—which, as this record shows (39a-41a, 136a), may well be large enough to have a substantial impact upon domestic U.S. oil prices. In addition, the Department of Energy stated in a recent filing in the ongoing investigation of TAPS rates before FERC that "the national economic interest and the national energy policy to reduce reliance on imported oil militate in favor of the minimum tariffs consistent with the costs and risks prudently incurred by the pipeline owners." (Pre-Hearing Brief of the United States Department of Energy, FERC No. OR78-1, December 30, 1977, p. 9.)

company enterprises would in large measure simply be "moving money from one pocket to the other." (*Id.* at 162.)[31]

The Commission's Order

On June 28, 1977, the Commission, by a unanimous vote, issued the order under review (623a), which instituted a formal investigation of the proposed TAPS rates and suspended those rates for the seven-month statutory period, pursuant to section 15(7) of the Act. The Commission also authorized the carriers to file (if they so chose), on one day's notice, interim rates not to exceed specified levels for effectiveness during the suspension period (subject to a refund condition).

In deciding to institute an investigation, the Commission noted that the carriers "do not object to a formal investigation of the filed rates" and found that the pro-

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[31] Both the ICC Bureau and the Department of Justice responded to a comment directed to the Commission by counsel for Sohio Pipe Line that "if this pipeline is stopped, you're going to have an 800-mile cannon" (*id.* at 80)—in other words, that the carriers might not operate the pipeline if their proposed rates were suspended. Counsel for the Bureau discussed, in answer to a Commissioner's question, possible federal-court injunctive remedies in such an event. (*Id.* at 145-47.) And counsel for the Department of Justice stated that "an *agreement* on the part of these owners not to use the line, in order to coerce the Commission into granting them higher rates or perhaps coerce Congress into . . . taking jurisdiction away from the Commission" could have "antitrust consequences." (*Id.* at 121 (emphasis added).) He added that the Department "would not take any action unless the anti-trust division was convinced that, in fact, an illegal conspiracy, which was not the subject of any defenses, had been committed." (*Id.*)

From this, petitioners repeatedly imply that they were compelled to adopt the suggested interim rates under threat of "criminal prosecution" (Pet. Br. 8-9, 41). Such an implication is wholly unfounded.

testants had made "a sufficient showing of probable unlawfulness" to warrant an investigation. (625a-26a.)[32]

With respect to suspension, the Commission rejected the contention of some of the carriers that it lacked authority to suspend initial rates.[33] It relied for this view upon the language of section 15(7), Commission precedent, and similar suspension provisions under the Act pertaining to other modes of carriage which include "'grandfather' language making the provisions inapplicable to 'initial' rates filed on or before a certain date." (626a-27a.) "By implication, then," the Commission stated, "the investigation and suspension provisions *are* applicable to initial rates filed after such date." (627a (emphasis in the original).) The Commission also decided as a matter of discretion that it should not withhold suspension relief, citing the protestants' claim that a refund remedy would not afford "adequate protection." (627a.) The Commission concluded: "Although we recognize that the refund remedy is available, we do not believe that the rates can be allowed to go into effect without suspension, when, as here, the protestants have made a showing of probable unlawfulness." (*Id.*)

The Commission also held that it was empowered to allow the carriers to file specified interim rates during the suspension period and that such action, contrary to the carriers' view, would not constitute rate prescription within the meaning of section 15(1) of the Act, which requires a full hearing. "These interim rates," it stated, "would not be intended to have permanent effect, but would merely be interim rates that we would allow to be collected during the suspension period." (628a.) Further,

[32] The investigation was instituted pursuant to sections 15(1) and 15(7) of the Act and encompasses both suspended and interim rates. (637a.)

[33] With regard to the position of petitioner Exxon on this issue, *see* n.16, p. 8, *supra*.

"[s]uch rates, if filed, would remain subject to Commission scrutiny. . . ." (*Id.*) The Commission added (629a):

> We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest.

In determining the level of the interim rates that it would allow the carriers to file, the Commission accepted the "basic data" supplied by the carriers and (with one exception favorable to the carriers) applied existing Commission ratemaking standards for crude oil pipelines.[34] (630a. *See* 632a-35a.) Thus, although it believed that "substantial questions have been raised" by the protestants, particularly with regard to depreciation expense and removal charges, the Commission deferred those issues for consideration in the formal investigation. (630a-31a.) The "excessive construction costs" alleged by the protestants were likewise found not to be "a matter that can be properly dealt with at the present stage of the proceeding." (631a-32a.)

[34] Petitioners now assert that their data was "supplied informally" and that the Commission "took no evidence." (Pet. Br. 9, 10, 36.) But the Commission had requested the carriers to supply data showing how their proposed rates were computed—rates under which they would collect $2.7 billion annually—and was surely entitled to utilize their submissions. (*See* 218a-50a, 640a-43a.) And whether or not the carriers' data and that submitted by the protestants would be deemed "evidence" in a subsequent formal investigation (*see* 49 C.F.R. § 1100.19 (1976)), the Commission, in fact, received voluminous economic data upon which its suspension determination was based.

Only the carriers' treatment of interest expense—the "double-dipping" issue—was rejected by the Commission, which emphasized that the consent decree standard used by the carriers "has never been employed in a Commission proceeding as the test of reasonableness of rates." (632a-33a.) The Commission stated (633a):

> Its [the consent decree's] sole legal status is as a limit on the amount of dividends that pipelines may pay to shipper owners without risking prosecution under the Elkins Act for illegal rebates. Moreover, as a standard of reasonableness, it has nothing to recommend it from a conceptual standpoint. Although valuation is a measure of the entire investment, the consent decree standard allows a return on valuation to be used entirely to compensate one segment of the capital invested. Such a standard can have no relationship, except by coincidence, to the carriers' true capital costs. *As shown in Appendix 3, the filed rates would produce returns on equity ranging from 31 percent to 96 percent.* Accordingly, it can be seen that the tariff rates would produce returns exceeding capital costs, even where the carriers' own expense and investment data are accepted. [Emphasis added.]

The carriers' composite return on equity under their proposed rates, as shown by the Commission's appendix, would be 46.0 percent, and their rates of return on valuation would range from 12.4 to 13.5 percent. (644a.)

The Commission nonetheless declined to utilize an 8 percent return on valuation, which it had determined in prior cases to be the standard for crude oil pipelines. (633a-35a.) An 8 percent return on valuation in this case, it found, would produce insufficient returns on equity. The Commission determined instead to utilize "for present purposes" a 10 percent return on valuation—a standard that it had previously used for "petroleum

products" pipelines. (634a-35a.) The interim rates thus computed by the Commission using this latter standard are as follows (638a-46a):

Amerada Hess	$4.85
ARCO	4.91
BP	4.68
Exxon	5.10
Mobil	4.84
Sohio	4.70
Union Alaska	4.89
Composite Rate	$4.84 [35]

The returns on equity under these rates range from 13.3 to 54.3 percent,[36] and the composite return on equity is 23.0 percent. (635a, 646a.)[37]

Finally, the Commission required as a condition of its acceptance of the carriers' interim rate filings that they "keep account of the amounts collected under the interim rates or the proposed rates should they become effective"

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[35] This rate is $1.37 or 22 percent below the $6.21 composite rate proposed by the carriers (*see* 644a). Although the composite interim rate figure, which is derived from the Commission's appendix, included Phillips Alaska, the June 28 order under review did not in terms apply to Phillips (*see* n.17, p. 9, *supra*). A suspension order as to Phillips was entered on July 18, 1977, and the interim rate that it was allowed to file is $4.87 per barrel.

[36] There is "no figure for Mobil which claims to be totally debt financed." (635a.)

[37] With respect to the carriers' argument that the "abnormally high proportion of debt in their capital structures . . . is made possible by the fact that their debt obligations are unconditionally guaranteed by their parent oil companies" and that "rates based on 10 percent return on valuation provide a much lower return on equity with a more normal capital structure," the Commission stated that this rate of return "appears suitable for present purposes," emphasizing that its use here would not constitute a "prejudgment" of the issue either in the formal investigation or in an independent Commission rulemaking proceeding which encompasses oil-pipeline rate of return issues. (*Id.*)

and "agree to refund any portion of such amounts that may ultimately be established as excessive." (636a.) This condition was imposed, the Commission said, because "[w]e recognize that even the lower interim rate levels may prove upon investigation to exceed reasonable levels." (*Id.*)[38]

Proceedings in the Court of Appeals

Commencing July 6, 1977, each of the petitioners sought review in the Fifth Circuit of the Commission's suspension order, together with injunctive or stay relief. The Alaska parties intervened on the side of the federal-government respondents, who moved to dismiss on the ground that suspension orders of the Commission are not reviewable in the courts. (718a, 726a.) On July 29, after hearing oral argument, the court of appeals (Brown, C.J. and Godbold, J.), with one judge (Roney, J.) dissenting, found that the Commission had acted within its statutory authority and, having so found, dismissed the petitions for review.[39] (746a-61a.)

Addressing the jurisdictional issue, the court of appeals held that "the rule of unreviewability" of ICC suspension orders "presupposes an affirmative answer to a

[38] The carriers filed petitions for reconsideration seeking upward modification of the interim rates, principally on the ground that the 1.2 million barrels per day throughput assumed by the Commission in its order was too high for the seven-month suspension period and, accordingly, that their per barrel costs would be higher than assumed. (578a. *See* 775a, 782a.) The Commission, on September 27, 1977, denied the carriers' petitions, pointing out that "1.2 million barrels is the amount that they reported to the Commission as their expected normal daily throughput. . . ." (775a-76a.) The Commission also denied a petition for reconsideration in part filed by the State of Alaska, which challenged, *inter alia*, the Commission's treatment of taxes, which it computed on an imputed or "normalized" basis when the actual taxes incurred by the carriers will be substantially less. (779a-80a, 782a.)

[39] The court also denied all injunctive and stay relief sought by the petitioners. (761a.)

preliminary inquiry into whether the Commission has acted within the authority granted to it by § 15(7)." (755a.)

Turning to such "preliminary inquiry," the court held, first, that the Commission is authorized under section 15(7) to suspend initial rate filings. (755a-57a.) The pertinent language of section 15(7) it found, has "no plain meaning," because "[t]he term 'new' can refer to both changed and initial rates or only changed rates," and the legislative history "yields little insight, . . ." (756a.) However, the court concluded on the basis of its "examination of statutes modeled on § 15(7) and of the legislative policy underlying that section . . . that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates." (*Id.*) The court relied, as did the Commission, on the other suspension provisions in the Act, each of which contains a grandfather clause that exempts certain initial rates, concluding that "[i]f initial rates were not covered there would have been no need for the grandfather clauses."[40] (*Id.*) With respect to legislative policy, the court stated (757a):

> Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

[40] The court also cited section 1002(g) of the Federal Aviation Act, 49 U.S.C. § 1482(g), which is similar to section 15(7) except that it expressly prohibits suspension of initial tariffs. From this the court concluded that "if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have done so specifically. . . ." (756a-57a.)

The court also held that the Commission was authorized as "corollary to its suspension power" to suggest interim rates that it would allow the carriers to file without suspension. (760a.) The Commission, in the court's view, simply "chose not to exercise to its full limits the drastic but available power of unconditional suspension"—which would "leav[e] the carriers without any tariffs but free to file new tariffs if they wished" but subject to a "new exercise" of the suspension power. (757a-58a.) The court found, contrary to the carriers' position, that the section 15(7) suspension power was not "an all or nothing instrument" and that the Commission "may elect to exercise its power less than fully" in the manner that it did. (758a.)

The Commission's imposition of a keep-account and refund requirement, as a condition to its acceptance of interim rate filings, was likewise held to be within its authority. Such a condition—both as applied to interim rates during the suspension period and thereafter to the originally-filed rates—was also held to be a valid corollary to the Commission's suspension power.[41] (760a-61a.) As to the carriers' final contention that the Commission's action was an abuse of discretion and its interim rates confiscatory and violative of the Fifth Amendment, the court stated that "[a]ssuming that we can review the Commission Order through these constitutional entry points the record before us gives no basis upon which we can act." (761a.)

Having thus completed its threshold inquiry and determined that the Commission did not exceed its statutory authority, the court of appeals granted the motion

[41] The court disclaimed reliance on the authority expressly conferred by section 15(7) to require carriers to keep account and refund where "a proposed increased rate or charge" is suspended. (761a.)

to dismiss.[42] The carriers thereafter filed tariffs at the maximum interim rates that the Commission indicated it would not suspend.

On and after September 21, 1977, the carriers filed their petitions for certiorari in this Court and simultaneously sought stay relief. A stay of the Commission's order was granted by the Court on October 20, 1977, subject to a keep-account and refund condition; and an order embodying these terms was entered on November 14, 1977.[43] (784a-86a.) Certiorari was granted and the cases consolidated on November 28, 1977. (789a.)

SUMMARY OF ARGUMENT

The Commission was empowered under section 15(7) of the Interstate Commerce Act to issue the suspension order in this case.

1. Section 15(7) authorizes the Commission to suspend "any schedule stating a new individual or joint rate." A rate that has not previously been in effect is, literally, a "new" rate—whether an "initial" rate, as in this case, or a "changed" rate that replaces an earlier rate. This construction is supported by the purposes and legislative history of section 15(7), the Commission's long-standing interpretation, and subsequent legislation modeled upon section 15(7)—in which Congress repeatedly made clear its understanding that the authorization to suspend "new" rates embraces both initial and changed rates.

a. The grant of suspension power in the Mann-Elkins Act of 1910 was intended to correct serious deficiencies in the statutory scheme. Prior to 1910, the Commission could not disturb any carrier-filed rate, even where it was

[42] A petition for rehearing by petitioner BP was denied on September 8, 1977. (774a.)

[43] Justices Brennan, Marshall and Blackmun dissented from the November 14 order. (786a-88a.)

manifestly excessive, until after the rate had gone into effect and then only after a full investigation. Shippers who paid a rate ultimately found to be excessive could seek reparations, but this was found by Congress to be an inadequate remedy seldom used. And shippers had begun to seek injunctive relief in the courts against new rates claimed to be unreasonable, with diverse results that jeopardized the regulatory goal of uniformity.

Each of these concerns, which Congress remedied by giving the Commission comprehensive power to suspend new rates, exists as fully in the case of initial rates as changed rates. Under petitioners' construction of section 15(7), carriers would be able to file *any* initial rates, no matter how outrageously excessive, and the Commission would have no power to suspend. Nothing in the legislative history evidences a Congressional intent so opposed to the purposes, as well as the language, of the Act.

While much of the debate during Congress' consideration of the Mann-Elkins Act refers to the suspension power in the context of rate increases, this simply reflects the fact that in 1910—with the railroad system already in place, and oil pipelines (the only other transportation mode then subject to the Act) not yet a significant subject of regulation—attention was naturally focused on the problem of widespread increases in rail rates, rather than initial rates for new lines or services. But, as is not uncommon, the legislation enacted was more comprehensive than the immediate spur that gave rise to it. Congress worded the statute broadly to cover any "new" rate, and the suspension provision was frequently described during the debates in terms consistent with the inclusive scope that its purposes and language reflect. Petitioners have shown only what is evident: that "new" was intended to include changed rates. They have not shown that it was intended to exclude initial rates.

b. Section 15(7) has served as the model for many subsequently-enacted suspension provisions—in other parts of the Interstate Commerce Act and in other regulatory statutes—which demonstrate a clear Congressional understanding that section 15(7) authorizes the suspension of initial rates.

Thus, section 216(g) of the Act, enacted in 1935 and applicable to motor carriers, is identical to section 15(7) in authorizing the Commission to suspend "any schedule stating a new individual or joint rate . . . ." However, section 216(g) also provides that the suspension power "shall not apply to any initial schedule or schedules filed on or before July 31, 1938" by pre-1935 motor carriers. Similarly-worded suspension provisions—including comparable "grandfather" clauses for certain initial rates—were included in the legislation bringing water carriers (in 1940) and freight forwarders (in 1942) under the Act. Congress described these later provisions as containing "the same power to suspend new rates" as provided in section 15(7) (H.R. Rep. No. 2066, 78th Cong., 2d Sess. 22 (1942)).

These additions to the Act show that Congress understood the power to suspend "new" rates to include "initial" rates. The grandfather provisos would otherwise have been superfluous. Moreover, the fact that only narrow categories of initial rates were grandfathered unmistakably shows that all other initial rates were regarded as within the suspension power—a conclusion expressly confirmed by applicable legislative history.

The subsequently-enacted portions of the Act refute petitioners' argument that Congress could not have deemed it fair to allow suspension of an initial rate and thereby render a carrier unable to operate during the suspension period unless it filed an interim rate acceptable to the agency. That is exactly what Congress intended in authorizing suspension of "new" rates—including initial

rates—filed by motor carriers, water carriers and freight forwarders. There is no reason to suppose Congress intended differently by its use in 1910 of the identical words in authorizing suspension of "new" rates filed by railroads and oil pipelines.

Section 216(g) also refutes petitioners' "authoritative gloss" argument derived from the addition to section 15(7) in 1920 of a provision that if a rate investigation is not completed during the suspension period, "the proposed change of rate" shall go into effect. The identical language appears in section 216(g), which undeniably authorizes suspension of initial rates.

c. The Commission has repeatedly over many years interpreted its suspension authority under section 15(7) as extending to initial rates. Petitioners' claim that the Commission's decisions did not involve "original rates" but merely "changes in prior classifications or practices" has no basis.

2. Petitioners' argument that the Commission unlawfully "prescribed" rates, by informing the carriers of maximum interim rates that it would not suspend, misconceives what the Commission did. Petitioners could not object if the Commission suspended their initial filings without more, leaving the carriers with the unhappy choice of either waiting out the suspension period or refiling lower interim rates (subject each time to suspension) until a level was reached that the agency would accept. Yet petitioners do object that the Commission instead sought to avoid a lengthy trial-and-error process of that kind—a process which, since the pipeline was ready for operation, would have served the interests of neither the carriers nor the public. Obviously, petitioners' objection is not so much to the alleged "prescription" of interim rates as it is to the suspension of their higher initial filings. Failure to suspend, however, would have constituted an abandonment of the Commission's "mandate to

assess the reasonableness of the rates and to suspend them pending investigation if there is a question as to their legality" (*United States* v. *Chesapeake & Ohio Railway Co. ("Chessie")*, 426 U.S. 500, 514 (1976)).

The Commission's action indicating interim rates it would not suspend is supported by *Chessie*, where the agency announced it would withhold suspension of a rate increase if the increased revenues were spent for specified purposes. The Court held that this "condition precedent to the immediate implementation of the rate increase" was "a legitimate, reasonable, and direct adjunct" to the Commission's suspension power (426 U.S. at 513-14).

3. The Commission was likewise authorized to require, as a condition of its acceptance of the interim rates without suspension, that the carriers agree to keep account and to refund any charges in excess of the just and reasonable rate levels determined in the formal investigation. *Chessie* upheld the Commission's authority to impose "condition[s] precedent" to its acceptance of rate filings without suspension that are "directly related" to its "mandate" under the suspension power (426 U.S. at 513-14). Here too, the Commission's conclusion that even the interim rates—which were premised on the carriers' own cost data and utilized a higher rate of return than in prior cases involving crude oil pipelines—"may prove upon investigation to exceed reasonable levels" (636a), and that a refund condition was therefore necessary, was "directly related" to its "mandate" to suspend new rates "if there is a question as to their legality."

Nothing in section 15(7) or its legislative history indicates that Congress, by providing expressly for refunds where a suspended increase goes into effect before a formal investigation can be completed, intended to deny the Commission discretion to impose a similar requirement as a condition to withholding suspension of an initial or decreased rate.

4. The Commission's order does not contravene any rights of the carriers under the Fifth Amendment. The carriers are receiving a full hearing in the current investigation, and they were afforded an extraordinary measure of due process at the suspension stage. The interim rates, which provide a composite 23 percent return on equity using the carriers' own cost data, are surely not confiscatory. They will likely prove to be on the high side—which is why the Commission insisted on a refund condition.

ARGUMENT

Suspension actions within the Commission's statutory authority are not subject to review in the courts. *United States* v. *Students Challenging Regulatory Agency Procedures ("SCRAP I")*, 412 U.S. 669 (1973); *Arrow Transportation Co.* v. *Southern Railway Co. ("Arrow")*, 372 U.S. 658 (1963). This rule, contrary to petitioners' suggestion (Pet. Br. 34 n.50), is applicable to both orders suspending new rates and decisions not to suspend. As stated in *Arrow*, "courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission." 372 U.S. at 670. The basic reasons for nonreviewability—avoidance of "diverse" decisions by the courts, recognition that section 15(7) represents a "careful accommodation" of interests that would be "disturb[ed]" by judicial review, and prevention of "an undesirable interference" with the orderly exercise of the Commission's suspension power (*SCRAP I*, 412 U.S. at 696-98)—apply as much to a suspension order as to a decision not to suspend.[44]

[44] Lower courts, both before and after *Arrow*, have dismissed for lack of jurisdiction suits to enjoin a Commission suspension order. *E.g.*, *Great Western Packers Express, Inc.* v. *United States*, 246 F. Supp. 151 (D. Colo. 1965) (three-judge court); *Consolidated Truck Service, Inc.* v. *United States*, 193 F. Supp. 773 (D.N.J. 1960) (three-judge court). *Cf. Long Island Rail Road Co.* v. *United States*, 193 F. Supp. 795 (E.D.N.Y. 1961) (three-judge court). *See* K. Davis, *Administrative Law Treatise* § 28.16, at 966 (1970 Supp.) ("One important area of administrative action in which judicial review is unavailable even if the agency acts arbitrarily or in abuse of discretion involves the suspension or refusal to suspend newly filed rates.")

To be sure, suspension is "a particularly potent tool" (*Chessie*, 426 U.S. 500, 513 (1976)) and may cause unrecoverable loss to a carrier; that is why Congress limited the suspension period to seven months.[45] But failure to suspend may result in irreparable injury to small shippers, their customers, consumers and others (as here); the inadequacy of a reparations remedy was a prime reason why Congress added the suspension power in the first place.[46]

We agree with the court of appeals that a Commission suspension order is reviewable for the purpose of determining whether the agency was authorized to issue it.[47] We submit that in this case the Commission's order was fully within its statutory authority.

I. THE COMMISSION HAD AUTHORITY UNDER SECTION 15(7) OF THE ACT TO SUSPEND THE CARRIERS' INITIAL RATES.

In construing a statute the Court's "first reference is of course to the literal meaning of the words employed" (*Flora* v. *United States*, 357 U.S. 63, 65 (1958)).[48] Since 1910 the Commission has been empowered under section

[45] *See Arrow*, 372 U.S. at 664-66.

[46] *See* discussion, pp. 34-35, *infra*.

[47] The court of appeals cited the large volume of information that the Commission had before it at the suspension stage and also attached to its opinion the reasoned order that the Commission issued. (750a-51a.) Thus, the instant case does not present the issue of reviewability of a suspension order entered by an agency either without any facts before it or without giving any reasons.

[48] *See also Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring): "The starting point in every case involving construction of a statute is the language itself."

15(7) of the Interstate Commerce Act to suspend, pending investigation of its lawfulness, "any schedule stating a *new* individual or joint rate, fare, or charge" (emphasis added). Petitioners in this case, advancing a novel interpretation of the statute, argue that "any . . . new" rate does not mean every new rate. Instead, they say, it means only a rate that is new because it changes an existing rate for an old service, and does not include a rate that is new in the most literal sense—a new rate for a new service.

A most persuasive showing of legislative history, Congressional purpose, administrative construction and judicial precedent is required to sustain an interpretation of statutory language so at war with its literal meaning.[49] Petitioners have not come close to carrying this burden. Indeed, as we shall show, all of the relevant aids to statutory construction point the other way.

Petitioners' interpretation ignores the reasons why Congress empowered the Commission to suspend rates pending final decision on their lawfulness. Petitioners claim no less than the right to charge *any* initial rate, no matter how outrageously excessive, free from any power of the Commission to suspend[50]—notwithstanding the clear

[49] While the courts, in interpreting a statute, do "have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results * * * or would thwart the obvious purpose of the statute' . . . it is otherwise 'where no such consequences [would] follow and where * * * it appears to be consonant with the purposes of the Act * * *.'" *Commissioner of Internal Revenue* v. *Brown*, 380 U.S. 563, 571 (1965) (citations omitted).

[50] That this is exactly the import of petitioners' contention was acknowledged by one of their attorneys when asked by Commissioner Hardin during the oral argument: "If we do not have the power to suspend then would the carriers be in a position to file a rate, say, at $35 a barrel and the Commission still could not suspend it?" Counsel for petitioner Exxon, while describing the example as a "horror

intent of Congress that the suspension authority would constitute a "tremendous power"[51] for enforcing the basic statutory mandate that "[*a*]*ll* charges . . . [for] transportation . . . shall be just and reasonable."[52] Petitioners do not deny that the suspension power was enacted to protect shippers and consumers against economic injury resulting from excessive increased rates, for which reparations was not considered an adequate remedy. Yet they argue that Congress failed to provide the same protection with respect to excessive initial rates that may have an identical economic impact.

Crucial to petitioners' position is their erroneous assumption that Congress could not have intended to allow the Commission to suspend a carrier's initial tariff, and thereby leave the carrier with the alternatives of not operating during the suspension period or of filing an interim tariff acceptable to the agency. Throughout their brief, petitioners choose to emphasize the former alternative and to shrug off the important fact that a carrier whose initial tariff is suspended is still free to file a tariff that is acceptable to the Commission on an interim basis, and to operate under such tariff during the suspension period. While the carrier may not regard the interim rate as desirable, it is no worse off than a carrier whose increased rate is suspended and which, as a result, is forced to operate for seven months on the basis of an existing rate that it has found wholly inadequate (or even "confiscatory") and therefore proposes to increase.

As shown below, petitioners' position is in conflict with the Commission's own long-standing practice. Moreover,

case," replied: "If you do not have that power, that would be right. That would be Congress's decision." (App. (Vol. III), Ex. 1, pp. 17-18).

[51] *Chessie*, 426 U.S. at 513, *quoting*, Senator Elkins (45 Cong. Rec. 3471 (1910)).

[52] 49 U.S.C. § 1(5) (emphasis added).

Congress has repeatedly made clear its intent, in enacting subsequent legislation modeled after section 15(7), that a carrier's initial rates are indeed subject to suspension. In so doing, Congress confirmed its understanding that the words granting the suspension power mean what they say: the power to suspend "new" rates embraces both initial and changed rates.

A. The Legislative History of the Mann-Elkins Act is Fully Consistent with the Applicability of Section 15(7) to Initial Rates.

Section 15(7) of the Interstate Commerce Act is derived from section 12 of the Mann-Elkins Act of 1910 (36 Stat. 539, 551). Prior to its enactment the Commission, empowered by the Hepburn Act of 1906 (34 Stat. 589) to determine the validity of a carrier's existing rates, could initiate a proceeding against a rate believed to be unlawful only after the rate had gone into effect. Moreover, it had no power to disturb such rate until after completion of a full investigation. *See Chessie*, 426 U.S. at 510, 513. If the rate was ultimately found to be excessive, shippers who had paid it could seek reparations; but this was widely recognized as an inadequate remedy. The Senate Committee, citing deficiencies of the statute as it then stood, stated:

> It is true that . . . a shipper who has paid a rate subsequently adjudged to be unreasonable may compel restitution by the carrier of the excessive rate paid; but in practice it is found that such restitution is but seldom sought or awarded; probably because the shipper generally recoups himself from the public for the amount of the loss through the augmented price of the commodity. [S. Rep. No. 355, 61st Cong., 2d Sess. 8 (1910).][53]

See also Chessie, 426 U.S. at 513 n.10.

[53] President Taft, in proposing that the Commission be given the suspension power, had also cited the inadequacy of the reparations remedy as a reason why such legislation was needed:

By providing the Commission with authority to suspend, Congress enabled the agency to block, at least temporarily, those rates which might prove to be unlawful—thereby "safeguarding the community against irreparable losses and recognizing more fully that the Commission's essential task is to establish and maintain reasonable charges and proper rate relationships." *Chessie*, 426 U.S. at 513, *quoting* 1 I. Sharfman, *The Interstate Commerce Commission* 59 (1931).

Another factor influential in inducing Congress to provide the Commission with suspension power was the frequency with which shippers had been resorting to the courts to seek injunctions against carrier rates claimed to be unreasonable. *Arrow*, 372 U.S. at 663. The Commission had, for several years prior to 1910, directed Congress' "attention to the fact that such courts as entertained jurisdiction were reaching diverse results, which engendered confusion and produced competitive inequities." *Id.* As a practical matter, only large shippers could generally afford to pursue such judicial relief, leaving weaker competitors seriously disadvantaged when it was obtained. I.C.C. Annual Report 12 (1908). In addition, due to the divergent conclusions reached by different courts regarding the reasonableness of particular rates, "the regulatory goal of uniformity was jeopardized." *Arrow*, 372 U.S. at 664.[54]

> Experience has shown that many, perhaps most, shippers do not resort to proceedings to recover the excessive rates which they may have been required to pay, for the simple reason that they have added the rates paid to the cost of the goods and thus enhanced the price thereof to their customers, and that *the public has in effect paid the bill.* [H.R. Rep. No. 923, 61st Cong., 2d Sess. 3 (1910); emphasis added.]

[54] In the hearings on the Mann-Elkins Act, the National Industrial Traffic League, an association of shippers, had similarly cited "the complications growing out of these orders issued by federal courts and the impracticability of a great number of small shippers secur-

The resulting "disparity of treatment as between different shippers, carriers, and sections of the country, causing in turn 'discrimination and hardship to the general public,'" as this Court said, "brought the whole problem to a head" and led to enactment of the suspension power. *Arrow*, 372 U.S. at 664. *See also Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 820 (1973); Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. Pa. L. Rev. 39, 45-47 (1971).

The policies thus sought to be served by Congress in granting the suspension power are no less applicable to initial rates than they are to increases or other changes in existing rates. Under petitioners' view, the public would be saddled with every initial rate filed by a carrier, however excessive and probably unlawful, until completion of the Commission's formal investigation. That was not the view of Congress, which expressly recognized the inadequacies of the reparations remedy and sought to prevent excessive rates from becoming effective by empowering the Commission to suspend. The need to suspend an excessive initial rate is just as compelling and just as much within the Congressional purpose as an excessive increased rate. If the Commission could not suspend it, an excessive initial rate would be as likely to induce those who are adversely affected to resort to the courts for injunctive relief as would an excessive increase —a result wholly at odds with the Congressional purpose. The court below was clearly correct in concluding that "[a]bsent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme." (757a.)

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ing protection" as reasons for urging Congress to authorize the Commission to suspend new rates. (Hearings on Bills Affecting Interstate Commerce Before the Comm. on Interstate and Foreign Commerce of the H.R., 61st Cong., 2d Sess. 437-39 (1910).)

Understandably, discussion of the suspension power appearing in the legislative debates in 1910 frequently refers to its application in the context of rate increases or other changes in existing rates. As the Commission pointed out, "the reason . . . is clear: the vast majority of rate proceedings involve situations where increases in existing rates are at issue." (626a.) Moreover, the Nation's rail system was already in place by 1910,[55] and since it was primarily concern over widespread increases in existing railroad rates—rather than initial rates for new lines or new services—that prompted Congressional consideration of suspension authority, it is not surprising that much of the discussion was addressed to that situation,[56] thus explaining many of the statements cited in petitioners' brief.[57] Petitioners have shown what could

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[55] This of course was not true of oil pipelines which were made subject to part I of the Interstate Commerce Act by the Hepburn Act of 1906 (34 Stat. 584).

[56] That Congressional action may have been prompted by immediate concern over increases in railroad rates does not, of course, limit the scope of the language enacted—language entirely consistent with the Act's broad purposes. *See, e.g., Arrow*, 372 U.S. at 69, where this Court concluded, in view of the broad goals sought to be achieved by the Act, that Congress, in giving the Commission power to suspend a carrier's rates, must have intended by implication to foreclose resort to the courts by competing carriers as well as by shippers, stating:

> It must be admitted that Congress dealt with the problem as it affected the relations between shippers and carriers, making no express reference to the interests of competing carriers and their customers such as are involved in the instant case. We see no warrant in that omission, however, for a difference in result.

See also Pfizer, Inc. v. *Government of India*, 46 U.S.L.W. 4073 (U.S. January 11, 1978) (No. 76-749) ("The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations." *Id.* at 4075.)

[57] Even so, petitioners misleadingly characterize this discussion. The references at p. 22 at n.29, of their brief are all to statements made during debate on a proposed amendment to the Mann-Elkins

not be disputed: that "new" rates were intended to include increased rates. Missing from their recital of the legislative history is evidence of an intent to exclude initial rates.

The undeniable fact is that Congress did not in terms limit the suspension power to "increased rates" or "changed rates," but extended it comprehensively to "any schedule stating a new . . . rate." Moreover, the suspension provision was frequently described during the legislative debates in terms consistent with the inclusive application that its purposes would suggest. Thus, Senator Elkins stated during the Senate debates:

> As I have said before, the making of rates, fares, and schedules are [sic] more within the control of the Interstate Commerce Commission under the bill than ever before.
>
> The Commission can suspend them the moment they are filed. They can proceed on their own motion to investigate them. . . .
>
> This virtually puts the rate-making power in the hands of the Interstate Commerce Commission. It is a tremendous power. [45 Cong. Rec. 3471 (1910).]

Congressman Townsend, the original sponsor of the legislation in the House of Representatives, stated in unqualified terms that the suspension power "permits the commission, either upon complaint or on its own motion,

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bill offered by Senator Cummins on May 17, 1910. That amendment provided for the automatic and indefinite suspension of "any schedule stating a new individual or joint rate, fare, or charge *which is an increase over* the then existing rate" until such time as the Commission found it to be just and reasonable. (45 Cong. Rec. 6409 (1910) (emphasis added).) Quite naturally, arguments favoring that amendment, which was defeated on May 26, 1910 (45 Cong. Rec. 6915 (1910)), emphasized the fact that where a rate *increase* was indefinitely postponed, there would be an existing rate already in effect that the carrier could charge in the interim.

to determine the justness and reasonableness of agreements, classifications, rates, charges, and regulations before they go into effect." (45 Cong. Rec. 5232 (1910).) And Congressman Mann, who became the measure's chief spokesman in the House, pointed out that it would apply to a "schedule of rates . . . proposing to change an existing rate" and "a schedule stating a new rate" (45 Cong. Rec. 4711 (1910)).[58]

In addition, while the Mann-Elkins Act expressly subjected "any schedule stating a new . . . rate" to the suspension power, it also provided that in a proceeding involving an "increased rate or proposed increased rate" the burden would be placed on the carrier to prove the reasonableness of the rate.[59] That additional consequences were thus attached to an "increased rate or proposed increased rate" certainly suggests that the suspension

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[58] As Congressman Mann stated:

> We have . . . provided in the bill that where the schedule of rates is filed with the commission proposing to change an existing rate, the commission shall have authority to suspend the taking effect of that rate; and we provide that when there shall be filed with the commission a schedule stating a new rate or classification or regulation or practice, the commission . . . may suspend the operation of the proposed rate, classification, regulation or practice. . . . [45 Cong. Rec. 4711 (1910).]

[59] The pertinent language read as follows:

> At any hearing involving a rate increased after January first, nineteen hundred and ten, or a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. [36 Stat. 539, 551 (1910)]

In 1940 this provision was modified to place the burden of proof on the carrier in any such proceeding involving "a change in a rate," thereby encompassing decreased rates. 54 Stat. 911, 912 (1940). As discussed below, the Commission's decisions distinguish between "change[d]" rates and initial rates for purposes of assigning the burden of proof (p. 49, *infra*).

authority itself was intended to be more encompassing in scope. *See* discussion, pp. 48-49, *infra*.

B. The Suspension Provisions in Other Parts of the Interstate Commerce Act as well as in Other Regulatory Statutes Confirm the Commission's Power to Suspend Initial Rates Under Section 15(7).

Congress in subsequent years repeatedly manifested its understanding that section 15(7) authorizes the suspension of initial rates. This is readily shown by comparing section 15(7) with the suspension provisions contained in other parts of the Interstate Commerce Act as well as in other regulatory acts—for all of which section 15(7) has served as the model. Many of these later enactments demonstrate, as the court below pointed out, that "when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language." (756a.)

1. Section 216(g) of the Interstate Commerce Act,[60] adopted when motor carriers were brought within its coverage in 1935, is identical to section 15(7) in providing that the Commission may suspend "any schedule stating a new individual or joint rate, fare, charge or classification," for a period of seven months. However, section 216(g) contains a "grandfather" proviso which, in its present form, states that "this subsection shall not apply to any *initial* schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation on October 1, 1935" (emphasis added).[61] When

[60] 49 U.S.C. § 316(g). This provision applies to common carriers by motor vehicle. An almost identical provision, section 218(c), 49 U.S.C. § 318(c), applies to contract carriers by motor vehicle.

[61] As originally enacted in 1935, the grandfather proviso to section 216(g) stated that the suspension power "shall not apply to any initial schedule or schedules filed by any such carrier in bona fide operation when this section takes effect [October 1, 1935]" (49 Stat. 558.) As discussed in the text, *infra*, the present wording—which

water carriers and freight forwarders likewise became subject to regulation under the Act (in 1940 and 1942, respectively), similarly-worded suspension provisions—with comparable grandfather provisos for certain initial rates—were included in the legislation.[62] These additions to the Act are significant here.

First, they demonstrate that Congress understood the words "any schedule stating a new . . . rate" as including initial rates. Otherwise, a grandfather proviso would have been entirely unnecessary. If such a proviso exempted *all* initial rates, it might arguably be explained as simply the product of an abundance of Congressional caution (*see* Pet. Br. 29). But where the proviso exempts only a narrow category of initial rates, the inescapable implication is that all other initial rates are included.

This Congressional intent is confirmed by the legislative history of sections 216(g) and 218(c) (*see* n.60, p. 40, *supra*). As originally adopted in 1935, no time limit was provided for the filing of an initial tariff by a grandfather motor carrier in order for such tariff to come within the scope of the proviso. 49 Stat. 560. In 1938, however, these sections were amended to set a deadline of July 31, 1938. 52 Stat. 1240. The purpose of the deadline was explained in the House Committee report as follows:

> Sections 14 and 15 propose to amend sections 216(g) and 218(c), respectively, of said act to permit the Commission to suspend any initial schedule of a common carrier or schedule or contract of a contract

provides a July 31, 1938 cutoff date for exemption of initial tariffs filed by grandfather motor carriers—was added in 1938 (52 Stat. 1240).

[62] Section 307(g), 49 U.S.C. § 907(g) (applicable to common carriers by water); section 307(i), 49 U.S.C. § 907(i) (applicable to contract carriers by water); section 406(e), 49 U.S.C. § 1006(e) (applicable to freight forwarders).

> carrier filed after the date that the provisions of the bill shall have become effective. The purpose of the proposed amendment is to prevent future filings of initial tariffs and schedules by motor carriers who were in bona fide operation on June 1, or July 1, 1935, without the exercise by the Commission of its suspension power. [H.R. Rep. No. 2714, 75th Cong., 3d Sess. 4-5 (1938).]

The legislative history of the later enactments bringing water carriers and freight forwarders under the Interstate Commerce Act likewise demonstrates that the statutory power to suspend "new" rates was understood by Congress to include "initial" rates. The suspension power given the Commission over the rates of water carriers in the Transportation Act of 1940 (54 Stat. 935, 938)—which applies to "any schedule . . . stating a new rate, fare [or] charge"—was described in the House Committee report as "similar to section 15(7) of part I" (H.R. Rep. No. 1217, 76th Cong., 1st Sess. 23-24 (1939)). The water carrier suspension provision included a grandfather exemption applicable to "any initial schedule filed prior to October 1, 1941 . . . ." (54 Stat. 939).[63]

Similarly, the legislation extending the Act to freight forwarders included suspension authority applicable to "any tariff stating a new rate," with a grandfather proviso protecting "any initial tariff filed prior to the expiration of ninety days after the date of enactment of this provision." (56 Stat. 288, 299.) The freight-forwarder suspension provision was described in the Conference Report as providing "the same power to suspend new rates as is provided for under parts I, II, and III of the act" (H.R. Rep. No. 2066, 78th Cong., 2d Sess. 22 (1942)).[64]

[63] The limited scope of this exemption was criticized by one of the Committee members during the floor debates on the ground that it could prevent a newly-authorized carrier from operating during the suspension period. As argued unsuccessfully by Congressman Wadsworth (with respect to contract water carriers): "Having secured his permit and desiring to go into business, he files with the Interstate Commerce Commission his contracts and his rates . . . . The Interstate Commerce Commission may suspend that rate for 6 months." (84 Cong. Rec. 9707 (1939).)

Second, the subsequently-enacted portions of the Act refute petitioners' central premise—their claim that Congress could not have deemed it fair to allow suspension of an initial tariff and thereby render a carrier unable to operate during the suspension period absent the filing of an interim tariff acceptable to the agency. That is exactly what Congress intended when it provided for the suspension of "new" rates—including initial rates—filed by motor carriers, water carriers and freight forwarders. And there is no reason to suppose that it intended differently when it used the very same language in the Mann-Elkins Act to provide for suspension of "new" rates filed by railroads and oil pipelines.

These additions to the Act are likewise wholly inconsistent with petitioners' view of the suspension power as limited to preserving the *status quo* in situations where there is an existing rate (Pet. Br. 32-33). Obviously, that was not the view that Congress had of the suspension power in these various enactments.

Third, the wording of section 216(g) rebuts another principal contention of petitioners, namely, their claim of an "authoritative gloss" placed upon section 15(7) in 1920 (Pet. Br. 24-26). In the course of amending section 15(7) in several respects in 1920, Congress added language declaring that if a rate investigation was not completed by the end of the suspension period, "the

[64] This description refers to the House bill, which "granted this [suspension] power with respect to all new rates . . . including those initially filed under part IV." H.R. Rep. No. 2066, 78th Cong., 2d Sess. 22 (1942). The Conference adopted the House version of the suspension power but added the grandfather proviso quoted in the text.

proposed change of rate" would go into effect.[65] Although the legislative history of the 1920 Act is completely silent as to why this particular wording was chosen, petitioners find in it proof of Congress' understanding that the statutory reference to any "new" rate meant the same thing as "change of rate" (Pet. Br. 25). However, exactly the same phrase (*i.e.*, "proposed change of rate") was also used in section 216(g) which, as we have shown, unmistakably authorizes the suspension of initial rates. Thus, absent more persuasive evidence of Congressional intent, the phrase cannot be regarded as limiting the scope of the suspension power to a "change" of rates. Since Congress undeniably did not intend the phrase to have that effect when it was included in section 216(g), there is no reason to assume such an intent when it was added to section 15(7).

2. Reference to other regulatory statutes containing suspension provisions modeled after section 15(7) is also instructive.

For example, section 204 of the Federal Communications Act, as originally enacted, authorized the Federal Communications Commission to suspend "any new charge, classification, regulation or practice. . . ."[66] Pursuant to this authority, the FCC, in *In re Western Union International, Inc.*, 28 F.C.C.2d 727 (1971), suspended an initial tariff provision because of its apparent inconsistency with other tariff provisions. The Commission acknowledged "that this leaves WUI without a tariff provision concerning this point," and therefore granted the carrier "permission to file, on short notice, tariff amendments . . . pending the outcome of an investigation. . ." 28 F.C.C.2d at 728-29. The FCC denied the carrier's motion for reconsideration, which claimed that it was without authority to suspend an initial tariff,

[65] Transportation Act of 1920, 41 Stat. 456, 486.

[66] 48 Stat. 1071 (1934), 47 U.S.C. § 204.

the FCC pointing out that the suspension would not "force [the] carrier to cease operations" because it had been allowed to file an amended tariff to be effective during the suspension period. *In re Western Union International, Inc.*, 31 F.C.C.2d 554, 556 (1971).

Shortly thereafter, Congress confirmed that the FCC had correctly interpreted the statutory reference to "any new charge." In the course of amending the Communications Act for other purposes it substituted the words "any new *or revised* charge" for the words "any new charge," explaining that this change was intended as a clarification of the agency's existing authority.[67]

[67] As the House Committee report stated:

> Section 204 of the Act (47 U.S.C. 204) is in effect, redesignated section 204(a) and is amended to extend from 3 to 5 months the period during which the Commission may suspend the operation of a tariff filing in whole or in part pending hearing on the lawfulness thereof. Other minor language changes in the subsection *clarify* that the provisions of the subsection are applicable to new as well as revised charges, classifications, regulations or practices. [H.R. Rep. No. 94-1315, 94th Cong., 2d Sess. 6 (1976) (emphasis added).]

See also S. Rep. No. 94-918, 94th Cong., 2d Sess. 7 (1976).

A similar construction has been given to the suspension provision of the Intercoastal Shipping Act of 1933 which, like section 15(7), provides that such power may be invoked whenever there is filed "any schedule stating a new individual or joint rate, fare, or charge . . . ." 46 U.S.C. § 845. As the Maritime Commission ruled with respect to this provision:

> Respondents contend our order of investigation and suspension was unauthorized by the statute because the tariffs were "initial" filings of actual rates, and that such action strictly construed would have precluded operation of their vessels because of the restriction in section 2, of the Intercoastal Shipping Act that "no person shall engage in transportation * * * unless and until its schedules * * * have been duly and properly filed and posted." We are authorized to suspend "any" schedule stating a "new" rate. [*Puerto Rican Rates*, 2 U.S. Mar. Comm'n 117, 122-23 (1939). *See also North Carolina Line-Rates To and From Charleston, S.C.*, 2 U.S. Mar. Comm'n 83 (1939).]

In contrast, when Congress in the Federal Aviation Act authorized the Civil Aeronautics Board to suspend rates, it included an express proviso denying the Board the power to suspend "any initial tariff." 49 U.S.C. § 1482(g). Thus, as the court below concluded after reviewing these various statutory provisions, "if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have done so specifically, and . . . Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's § 15(7) suspension powers" (756a-57a).[68]

3. Petitioners attempt to distinguish the provisions of the Interstate Commerce Act authorizing suspension of initial rates in the case of motor carriers, water carriers and freight forwarders, and also the suspension provision applicable to carriers under the Communications Act, on the ground that in those cases the agency possesses licensing power—a power it does not have with respect to oil pipelines and which it did not have with respect to railroads until 1920. (Pet. Br. 29-30 & n.42.) Authorization to suspend initial tariffs in this context, they argue, "would reflect no more than a desire to give the Commission plenary licensing authority" (*id.* at 30).

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[68] The reliance placed by petitioners (Pet. Br. 29) on the Federal Power Commission's interpretation of its suspension authority under section 4(e) of the Natural Gas Act (15 U.S.C. § 717c(e)) and section 205(e) of the Federal Power Act (16 U.S.C. § 824d(e)) is misplaced. The pertinent statutory language of the Natural Gas and Federal Power Acts (which in all relevant respects are identical to each other) is plainly more limited than that of section 15(7) of the Interstate Commerce Act. The suspension authority under section 4(e) of the Natural Gas Act applies to "any *such* new schedule" (emphasis added)—a term that clearly has reference to the immediately preceding subsection of that Act. That preceding subsection (section 4(d), 15 U.S.C. § 717c(d)) is concerned solely with changes in existing tariffs and the requirement for filing such changes.

They add (somewhat puzzlingly) that since the Commission "has already reviewed the proposed original rate of a motor carrier, water carrier or freight forwarder at the time it issues a certificate of public convenience and necessity . . . it would be inconsistent for it then to 'suspend' that rate." *Id.* at 30 n.43.

Petitioners' asserted distinction does not withstand analysis. To begin with, Congress has not said one word that supports their rationale. Even more importantly, if an agency is empowered to withhold or condition a license upon the setting of initial rates that it deems appropriate—*see, e.g., Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959), cited by petitioners—then there is that much *less* reason for Congress to give it independent authority to suspend initial rates. Conversely, where, as in the case of oil pipelines and railroads prior to 1920, the agency lacks licensing authority, the suspension power would be its only preventive defense against the institution by carriers of excessive initial rates.

As to petitioners' contention that the Commission has reviewed the carrier's initial rates at the time it issues a license, that is not the fact. Unlike the Power Commission, the ICC in practice does not review a carrier's proposed initial rates when considering its application for a certificate.[69] The Commission has frequently

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[69] The official form prescribed by the Commission for a motor carrier to use in requesting a certificate of public convenience and necessity (Form OP-OR-9, issued pursuant to 49 C.F.R. §§ 1003.1, 1130.1 (1976)) does not even provide for the submission of the carrier's proposed initial tariffs. Under Commission practice a carrier has ninety days *after* a certificate is granted within which to file its proposed initial tariffs.

In the case relied on by petitioners at Pet. Br. 30 n.43 (*West Coast Bus Lines, Ltd., Common Carrier Application*, 41 M.C.C. 269 (1942), *aff'd sub nom. North Coast Transp. Co.* v. *United States*, 54 F. Supp. 448 (N.D. Cal.), *aff'd in part and dismissed in part*, 323 U.S. 668

suspended the initial rates of motor carriers *after* giving the carrier operating authority (*see* pp. 50-51, *infra*).[70] Further, the express language and legislative history of the motor carrier provisions show unequivocally that Congress empowered the Commission to suspend the initial rates of carriers which already had operating authority under the Act.[71]

C. The Commission's Interpretation of its Suspension Power as Applying to Initial Rates is Entitled to Great Weight.

On a question of statutory construction "this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration," *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), which "should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1968). *See also Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409-10 (1975); *United States* v. *American Trucking Associations*, 310 U.S. 534, 549 (1940).

The Commission has repeatedly interpreted its suspension authority under section 15(7) as extending to initial rates. The first reported decision appears to be *Cotton from New Orleans*, 49 I.C.C. 751, 752 (1918), where the Commission noted that "[t]he local rates under suspension in this proceeding . . . were new rates in the sense that respondent had not previously

(1944), the applicant bus company submitted its proposed initial rates in the course of the certification proceedings only because it was seeking certification on the ground that its rates would be lower than those of an existing bus line.

[70] As *In re Western Union Int'l, Inc.*, 28 F.C.C. 2d 727 (1971), discussed *supra*, p. 44, indicates, this is also true under the Communications Act.

[71] *See* pp. 41-42, *supra*.

filed its port-to-port rates with the Commission." It therefore held the rates to be "initial rates" for purposes of determining which party had the burden of proof (*id.* at 753).[72]

In 1940 section 15(7) was amended to provide that if the suspended tariff involved a "changed" rate, classification or practice—rather than just an "increased" rate (*see* n.59, p. 39, *supra*)—the carrier would have the burden of proving it just and reasonable in the formal investigation. Thereafter, the Commission again concluded that the burden-of-proof proviso was not coextensive with its suspension power and that, in addition to "changed" rates, the suspension power applied in cases of "initial" rates where the protestant, rather than the carrier, would bear the burden of proof. In *Rail-Water, Grain in Bulk, Missouri, Illinois and Indiana to Buffalo*, 321 I.C.C. 564 (1963), involving the suspension of certain initial joint rates filed by a rail carrier and a water carrier, the Commission supported this conclusion by the following analysis of the Act:

> Of particular significance are the express terms found in sections 15(7) and 307(g). Each provide for suspension and/or investigation of "* * * a new rate * * *" which encompasses both changed and initial. However, each section places the burden of proof upon the proponent of only a "changed" rate. The distinction between the meaning of the two terms becomes readily apparent from the excepted provisions of section 307(g) which "shall not apply to any *initial* . . . schedule filed prior to October 1, 1941 * * *." Further support for this distinction is found in section 307(i) relating to water contract carriers whereby "a charge for a new service or a reduced

[72] As previously noted, section 15(7) originally provided that if the suspended rate was an "increased rate," the carrier would have the burden of proving it to be just and reasonable in the subsequent investigation. *See* p. 39, *supra*.

charge * * *" may be suspended and/or placed under investigation, but the subsection "shall not apply to any *initial* . . . schedule filed * * *." Comparable provisions with similar distinctions in the use of these terms as heretofore enumerated are also found in sections 216(g), 218(c), and 406(e) of the act governing motor common and contract carriers and freight forwarders respectively. Consequently, within the entire statutory framework, there is consistently recognized an express difference between "initial" and a "changed" rate . . . . [*Id.* at 566-67 (emphasis by the Commission).]

Petitioners attempt to distinguish these decisions on the ground that they did not involve "original rates" (*i.e.*, first and only rates, as we understand it), but merely "changes in prior classifications or practices" (Pet. Br. 27-28 n.39). This distinction, however, is entirely petitioners' own creation, for there is no evidence that the Commission has distinguished between "original" rates and "initial" rates in determining the scope of its suspension power.[73] For example, in *Bituminous Coal via Motor-Rail from Lynnville, Indiana to Chicago, Illinois*, 313 I.C.C. 573 (1961), the Commission suspended a single motor-rail rate under sections 15(7) and 216(g) of the Act, noting that the rail and motor carriers involved:

> have not previously transported coal over any route from Lynnville to Chicago, and so far as appears the [railroad] is not a party to any rate on coal over any route from Lynnville to the Chicago district. Thus, the proposed rate is an initial rate . . . ." [*Id.* at 574.]

[73] Petitioners claim support for their asserted distinction by reading the burden-of-proof provision of section 15(7), as amended in 1940, as placing the burden on the carrier to justify any "changed rate" but not a "changed classification or practice" (Pet. Br. 27 n.39). This reading of the statute is incorrect. The burden-of-proof provision, as revised in 1940 and still in effect, refers to a "changed rate, fare, charge, classification, regulation, or practice . . . ."

Moreover, under section 216(g) of the Act—which is in all pertinent respects identical to section 15(7)—the Commission has repeatedly suspended motor carrier rates that were "original" rates, either because the rates were being filed pursuant to newly-acquired operating authority, *e.g.*, *Machinery from Salt Lake City International Transport, Inc.*, 304 I.C.C. 286 (1958), or because the carrier's only previously-filed rates had been cancelled as unjust and unreasonable, *e.g.*, *Clay from Greybull, Wyoming, to Points in Middle West*, 314 I.C.C. 705 (1961). As the Commission stated in the former case:

> No rates of the respondent were in existence on this traffic prior to the publication of the proposed rates, for the reason that the authority to transport this traffic from Salt Lake City to the destination area was newly acquired. It is thus plain that the proposed rates are initial rates. [304 I.C.C. at 286-87.][74]

Petitioners cite *In re Wharfage Charges of the Galveston Wharf Co.*, 23 I.C.C. 535, 537 (1912), a case in which the Commission merely exercised its discretion not to suspend the carrier's "original" tariffs. The decision did not hold that the Commission lacked authority, and,

[74] Other similar cases include *Foodstuffs & Agricultural Commodities, Cal. & Ariz. to W. & S.*, 329 I.C.C. 321 (1966); *Lumber-Western Auto Transports, Inc.*, 306 I.C.C. 623 (1959); *Soybean Meal and Salt from Iowa & Neb. to Iowa, Neb., and S. D.*, 318 I.C.C. 99 (1962); *Animal Feed from Miss. and Tenn. to Midwest and Southwest*, 316 I.C.C. 94 (1962); *Wine From Canandaigua, N.Y. to Fla.*, 316 I.C.C. 246, 247 (1962).

Moreover, many suspensions of initial rates have been ordered by the Commission that are not reflected in published opinions. *See, e.g.*, the Affidavit of Albert H. Fitzgerald, Chairman of the Commission's Suspension and Fourth Section Board, listing cases found during a "two-hour . . . search" covering initial rates suspended during the years 1972 through 1975. (712a-17a.) Eight such cases involved "original" rates whose suspension left the carrier temporarily with no other rates. (715a-17a.)

as the cases we have cited demonstrate, the Commission has since repeatedly suspended such "original" rates.[75]

[75] Other decisions in which petitioners claim the Commission recognized that it was without authority to suspend "original" rates (Pet. Br. 26-27) do not so hold. *Restrictions in Routing in Connection with the Ga. & Fla. R.R. Between Greenwood, S.C. and Augusta, Ga.*, 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line R.R. v. United States*, 48 F.2d 239, 245 (W.D.S.C. 1931), *aff'd*, 284 U.S. 288 (1932), a case heavily relied on by petitioners, does not appear to involve the opening phrase of section 15(7) under which the Commission acted in the instant case, but rather the third phrase of that section. Under the first phrase the Commission has authority to suspend "any schedule stating a new individual or joint rate . . .," while under the third phrase, relating to a "new regulation or practice," the power to suspend is limited to a regulation or practice "affecting any rate, fare or charge . . . ." The cited case involved the question of suspending proposed restrictions on the applicability of certain existing joint tariffs, such restrictions plainly being regarded by the Commission as a "new regulation of practice." Finding that one of the carriers involved had never been a party to those tariffs, the Commission concluded as to that carrier that the proposed restrictions "do not relate to any regulation or practice affecting any existing rate, fare, or charge . . . within the meaning of section 15(7). . . ." 165 I.C.C. at 4. Thus, the decision does not constitute a determination as to the Commission's power to suspend a new rate under the first phrase of Section 15(7). Other cases cited by petitioners (Pet. Br. 27 n.38) are likewise not in point. For example, the language quoted from *Discontinuance of Inland or Off-Track Stations in N.Y. City*, 173 I.C.C. 727, 729-30 (1930) did not reflect a holding that the Commission's suspension authority does not apply to initial rates; on the contrary, it was the Commission's response to a carrier's argument that the suspension power does not extend to changed practices. *Maximum Rate Provision, Ocean-Rail to Southwest*, 258 I.C.C. 63 (1944) and *Salt from La. Mines to Chicago, Ill., St. Louis, Mo. and Intermediate Mainline Points*, 69 I.C.C. 312 (1922) are similarly distinguishable.

II. THE COMMISSION DID NOT PRESCRIBE RATES OR EXCEED ITS STATUTORY AUTHORITY BY ADVISING THE CARRIERS IN ADVANCE OF THE MAXIMUM RATES IT WOULD NOT SUSPEND PENDING INVESTIGATION.

Petitioners argue that even if the Commission was empowered to suspend their initial rate schedules, it exceeded its authority when it stated in the suspension order that it would allow the carriers (if they chose) to file during the suspension period specified maximum rates that it would not suspend. The Commission, they say, was limited either to suspending without more, or allowing the carriers' rates to go into effect as filed. By taking the additional step of advising the carriers in advance of interim rates that it would accept without suspension, the argument goes, the Commission transformed its action into a "'sham' suspension" and a prescription of rates without a full hearing in violation of section 15(1) of the Act. (Pet. Br. 32-42.)

This argument distorts what the Commission did. It is unquestioned that the Commission could have issued a naked suspension, with only a "statement in writing of the reasons" (section 15(7)). That would have left the carriers with the option of simply waiting out the suspension period[76] or refiling rates at a lower level in the interim—which, as shown by their action in ultimately acceding to the suggested interim rates, they almost certainly would have done. If the Commission then suspended a second round of proposed rates as still probably unreasonable, the carriers would again have been faced with the same option. At some point in the process they

[76] The carriers could of course have continued to assert the reasonableness of their proposed rates in the Commission's investigation; but it was evident that the investigation would not be completed within seven months.

would presumably have filed interim rates at a level low enough to secure Commission acceptance.[77]

What the Commission did was to try to avoid a trial-and-error process of this kind—a time-consuming exercise that, given the readiness of the pipeline for operation, would have caused injury both to the carriers and the public interest. Based on the carriers' data and the protests, the Commission had concluded that suspension was necessary if it was to carry out "its mandate to assess the reasonableness of the rates and to suspend them pending investigation if there is a question as to their legality" (*Chessie*, 412 U.S. at 514).[78] It also believed that the carriers would respond to suspension of their rates by refiling lower interim rates, rather than allowing the pipeline to remain idle for seven months. By announcing in advance the interim rates it would accept on one-day's notice without suspension, the Commission simply made it possible for the carriers to commence operations at the earliest possible time—if they decided to refile.[79] The carriers on their part always had the

[77] All such refiled rates, submitted by a carrier in an effort to obtain Commission acceptance during the suspension period, may arguably be deemed to have been "compel[led]" by the agency or not to be purely carrier-initiated (*see* Pet. Br. 36-37) in the sense that the carrier would doubtless have preferred its suspended rates. But an inevitable consequence of the suspension power is that it may force carriers to operate during the suspension period at rates other than those that they would prefer—indeed, that is the very purpose of the power.

[78] This was hardly a surprising conclusion where, as here, the carriers' proposed rates would have resulted in a composite return on equity of 46.0 percent and a composite return on valuation of 12.9 percent (*see* p. 20, *supra*).

[79] The statement-of-reasons requirement for suspension orders contained in section 15(7) serves to support the Commission's action here—not the converse, as petitioners appear to argue (Pet. Br. 33 n.49). Although the legislative history of this requirement is not entirely clear, the language is surely consistent with the view that a statement of the Commission's reasons for suspending would enable the carrier to decide whether or not to refile its rates in a form that would satisfy the agency's objections. *See* H.R. Rep. No. 923, 61st Cong., 2d Sess. 11, 84-85 (1910). *See also* Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. Pa. L. Rev. 39,61 (1971).

option of delaying the start of TAPS operations until after expiration of the suspension period—a course that would have rendered wholly academic the interim-rate provisions in the order.

The Commission's coupling of a suspension action with informing the carriers as to the tariffs that it would accept without suspension is not unprecedented or even unusual. In *Chessie*, the Commission suspended a proposed general rate increased by the railroads but announced that it would withhold suspension on the condition that the increased revenues were spent for deferred maintenance or capital improvements—the need for which had been asserted as a justification for the increase. 426 U.S. at 503-04. The Court held that this "condition precedent to the immediate implementation of the rate increase" was "a legitimate, reasonable, and direct adjunct" to the Commission's suspension power. *Id.* at 513-14.[80] An example of similar agency action is found in *SCRAP I*, where the Commission did not suspend the proposed surcharge but imposed a number of conditions (*e.g.*, the exclusion of certain categories of freight from the surcharge, inclusion of a specified expiration date) upon its withholding of suspension. 412 U.S. at 676 & n.6. And in *Port of New York Authority* v. *United States*, 451 F.2d 783 (2d Cir. 1971), the Commission suspended proposed increases in charges for so-called lighterage service, but allowed the carrier to file without

[80] The Court also pointed out that the railroads were "not required" to accept this condition, and "had the option to continue to insist on an unconditional increase . . ." and to assert the reasonableness of the suspended tariffs in the Commission's investigation. 426 U.S. at 515.

suspension increased charges "not to exceed 50%" of the increase initially proposed (*id.* at 785-86).[81]

Here, also, the Commission suspended the rates originally filed and informed the carriers of the lower rates it would accept during the suspension period. Plainly, such action does not constitute the prescription of rates without a "full hearing" (section 15(1)).[82] The just and reasonable rates for TAPS service will be prescribed in the investigation instituted by the Commission and currently in progress before FERC. The interim rates, as the Commission said (628a), are not "intended to have permanent effect"; they are simply rates that the agency allowed the carriers to file without suspension during the period of suspension of their originally-filed rates. Nor are the carriers being denied a full hearing. They are receiving an exhaustive evidentiary hearing in the current investigation.

It is true that the Commission made a detailed computation of the interim rates, obtaining the same kind of economic data and applying the same type of ratemaking standards that it would use in a formal investigation. But it should hardly be faulted for doing so—instead of, for example, suggesting a flat percentage reduction or saying nothing and letting the carriers make repeated filings on a trial-and-error basis. By means of its care-

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[81] The Commission's action was challenged not by the carrier but by a user of the service. The court dismissed for lack of jurisdiction to review the agency's suspension action.

[82] *See Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935) (three-judge court), where the Commission held extensive hearings on rate increases proposed by the railroads and then issued an order rejecting the proposal "as a whole" but stating that certain specified emergency increases would be "authorized" on a "permissive" basis (*id.* at 491). The court found that the Commission "*prescribed* no particular rates. It merely permitted the carriers to file new rates without suspension." *Id.* at 494 (emphasis in original).

ful calculations, based on the available data, the Commission sought not only to satisfy itself that the carriers' proposed rates were probably unlawful and thus should be suspended, but also to assure that the suggested interim rates would provide the carriers an adequate return during the suspension period.[83] This was responsible, not arbitrary or unlawful, agency action.

Moss v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970), upon which petitioners rely, was a far different case. In *Moss* the rate formula suggested by the agency as a condition of withholding suspension was adopted "through the cooperation of the carriers and the Board" in *ex parte* meetings (*id.* at 894, 902); this formula required "major changes in rate-making practices," not merely changes in rate levels (*id.* at 899); and, most importantly, the carriers withdrew their originally-filed rates, thereby "abort-[ing]" both the investigation instituted by the Board in its suspension order and the judicial review that would follow such an investigation (*id.* at 897 n.28, 900).[84] Here, by contrast, the investigation has not been aborted, and there will be full opportunity for judicial review of the agency's final decision. The Commission has not "fence[d] the public out" of the ratemaking process (*id.* at 893) or cooperated behind-the-scenes with the carriers; nor did its suggested rates involve a major change in

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[83] As discussed in the Statement, (pp. 19-20, *supra*), the Commission utilized the carriers' own investment and expense data in computing interim rates, and the sole adjustment it made in its existing ratemaking standards for crude oil pipelines was in favor of the carriers. In essence, the Commission rejected only the carriers' claim that they should be compensated twice for the interest expense on a $9 billion pipeline that is 85 percent debt-financed.

[84] As explained by the District of Columbia Circuit in 1975, *Moss* "stressed that the CAB's rate formula was the product of behind-the-scenes bartering between the agency and the carriers, and that none of the tariffs filed consistent with the CAB's formula were subject to investigation after they became effective." *Consolidated Edison Co. of N.Y., Inc.* v. *FPC*, 512 F.2d 1332, 1342 (D.C. Cir. 1975).

ratemaking practices. In other words, there is no "sham" element whatever about the Commission's suspension here: the interim rates it suggested are truly interim, a full investigation is going forward, and the rates prescribed in that investigation will be subject to judicial review.

III. THE COMMISSION HAD THE AUTHORITY TO CONDITION ITS ACCEPTANCE OF THE INTERIM RATES WITHOUT SUSPENSION UPON THE CARRIERS' AGREEMENT TO REFUND ANY CHARGES IN EXCESS OF THE RATES DETERMINED IN THE INVESTIGATION.

Petitioners challenge the Commission's authority to require, as a condition of its acceptance of the interim rates without suspension, that the carriers agree to keep account and to refund any excess of the amounts collected, both under the interim rates and the suspended rates when they become effective, over the rates ultimately determined in the formal investigation. (Pet. Br. 42-46. *See* 636a, 638a.)[85] As the court below concluded, however, imposition of this condition, "like the power to suggest the interim rates themselves," was a "valid corollary" of the agency's suspension power. (760a-61a.)

In *Chessie* this Court upheld the Commission's authority to impose "condition[s] precedent" to its acceptance of rate filings without suspension that are "directly related" to its "mandate" under the suspension power. 426 U.S. at 513-14. Here, the Commission found that "even the lower interim rate levels may prove upon investigation to exceed reasonable levels," (636a), and, *a fortiori*, that is true of the rates initially filed by the carriers, which

[85] We do not understand petitioners to challenge the Commission's keep-account requirement independently of the refund condition. With respect to the former requirement, see sections 20(5) and (7) of the Act, 49 U.S.C. §§ 20(5), (7).

would become effective after expiration of the suspension period. A "condition precedent" that the carriers agree to refund charges collected by them in excess of the levels determined to be just and reasonable after a formal investigation is, as in *Chessie*, "directly related" to the Commission's "mandate" to assess the reasonableness of new rates and to suspend rates of doubtful legality.[86] *Id.* at 514. If the carriers were unwilling to accept this condition, they "had the option," as *Chessie* points out, not to file interim rates on the Commission's terms. *Id.* at 515.

Petitioners' contrary argument is that the keep-account and refund provision in section 15(7) applies only in the case of a "proposed increased rate" and that the Commission should not be allowed to impose conditions that "plainly conflict" (Pet. Br. 44) with the intent of Congress. But it is not accurate to say that Congress, by expressly authorizing a refund requirement where a suspended increase goes into effect before a formal investigation can be completed, intended to deny the Commission discretion to impose a similar requirement with respect to an initial or decreased rate as a condition to withholding suspension. The legislative history of the keep-account and refund provision does not support any such preclusive intent by Congress.

This provision was adopted as part of the Transportation Act of 1920, 41 Stat. 456, 486, which also reduced the suspension period under section 15(7) from ten to five months. The House bill provided only a 120-day suspension period, and a keep-account and refund provision was included in this context. *See Arrow*, 372 U.S. at 665-

[86] The Commission implied in its order that without a refund condition it would not have accepted the interim rates—which were, after all, premised on the carriers' own "basic data" and computed using an above-standard rate of return on valuation (*see* 629a-30a).

66.[87] Its purpose is made clear in testimony of ICC Commissioner Clark before the House Committee:

> MR. SIMS [a Committee member]. Will the Commission have sufficient time during the period authorized for suspension, as you have indicated—that is, will the Commission have the time required to give proper consideration to the rates prior to that time?
>
> MR. CLARK. Well, we hope so. We can not predict with certainty, because we can not know what the conditions will be. We have undertaken to protect the shipper in the event of our inability to conclude the proceeding within 120 days by conferring upon the commission authority to require the carriers to keep an accounting of all of the traffic that moves under those rates, so that at the end of the investigation the commission can order the carriers to pay back to the ones from whom or in whose behalf they received payment what they have received in excess of what the commission finds would have been reasonable.[88]

Although the Senate bill did not include a refund provision, the House language was retained in conference and enacted. The Conference Report described the provision as requiring "that as to freight rates the carrier should keep a record in all cases where the commission had not concluded such hearing, and, if the commission finally found the rates too high, the carrier was required to make refunds to the shippers affected." [89]

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[87] *See also* H.R. Rep. No. 456, 66th Cong., 1st Sess. 29-30 (1919); 58 Cong. Rec. 8317 (1919), remarks of Rep. Esch.

[88] Hearings on H.R. 4378 Before the House Comm. on Interstate and Foreign Commerce, 66th Cong., 2d Sess. 90-91 (1919).

[89] H.R. Rep. No. 650, 66th Cong., 2d Sess. 6 (1920). The full text of the relevant paragraph is as follows:

> The House bill in section 417 authorized the commission to suspend rates for 120 days after their filing, at the end of which time they were to go into effect whether or not the commission had concluded its hearing, but that as to freight rates the carrier should keep a record in all cases where the commission had not concluded such hearing, and, if the commission finally found the rates too high, the carrier was required to make refunds to the shippers affected. The Senate amendment provided for a suspension for 120 days, and, if the hearing was not then concluded, for a 30 days' further extension, after which time the rates were to go into effect whether or not the hearing was concluded, and without any duty on the carrier to make refunds if the rate was later found to be excessive. The conference bill retains the House provision, but inserts the 30 days' further suspension provided for in the Senate amendment.

It would thus distort legislative intent to say that, in enacting this provision designed to protect shippers against excessive rates, Congress intended also—without saying so—to preclude the Commission from imposing a refund requirement as a condition to allowing carriers to file interim rates without suspension. The statutory refund language does not even apply to interim rates of this kind—increased or otherwise—but only to suspended rates upon expiration of the suspension period. And even in the case of suspended rates, there is no reason to infer that Congress intended to prohibit the Commission from requiring refunds as a condition of withholding suspension.

In an analogous situation, this Court upheld the authority of the Federal Power Commission to impose initial-rate or refund conditions in the exercise of its licensing power, even where it lacked the authority to do so directly under its ratemaking authority. *See Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959); *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968); *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965). Here also, whatever the Commission's authority to impose a refund requirement directly, it could nonetheless do so as a condition of withholding suspension.[90]

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[90] *See Admiral-Merchants Motor Freight, Inc.* v. *United States*, 321 F. Supp. 353 (D. Colo.) (three-judge court), *aff'd*, 404 U.S. 802

Petitioners further argue that if the agency should determine in its formal investigation that the just and reasonable rates for TAPS service are below the carriers' initial rates or the interim rates, the refund condition would "deprive" them of an opportunity to litigate in a reparations proceeding whether those rates were unreasonable during the specific past periods when they were collected. (Pet. Br. 44-46.) But there is no reason to assume, as petitioners do, that this issue cannot be litigated in the pending investigation, in connection with the computation of refunds by the agency. The statutory language (albeit not in terms applicable here) provides for refunds of those portions of a rate increase which, under the Commission's decision, "shall be found not justified" (section 15(7)). That language surely would not foreclose consideration of "special circumstances" (Pet. Br. 46) in determining the amount of any refund.[91] The refund condition in this case was broadly characterized by the Commission as providing for refunds of amounts "that may ultimately be established as excessive." (636a.) And the Commission's first ordering paragraph states that its investigation was instituted "with a view to making such findings and orders in the premises as the facts and circumstances shall warrant." (637a.)[92]

(1971) (refund requirement imposed as a condition to grant of a procedural extension of time upheld).

[91] We do not, of course, concede that the specific allegations made by petitioners, even if proved, would warrant a reduction in the amount of any refund. That is to be decided before the agency.

[92] It is noteworthy that the Federal Power Commission, which administers statutes containing refund provisions similar to that in section 15(7), *see* 15 U.S.C. § 717c(e) and 16 U.S.C. § 824d(e), has fashioned refund orders in the light of public interest or equitable considerations. *See, e.g., Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 299, 317-18 (1974) (refund obligation can be "worked off" by commitment of additional gas reserves to the interstate market).

If petitioners' argument is that they are entitled to a reparations forum as such, that is simply not so. The section 15(7) refund provision, applicable in the case of suspended rate increases, serves to obviate reparations litigation, and petitioners do not suggest it is unconstitutional. Here, although the statutory provision is not in terms applicable, the Commission concluded that shippers and those (such as the Alaska parties) who stand in their shoes should not be forced to undertake additional litigation to establish a reparations claim and that a refund requirement tied to the just and reasonable rate levels determined in the investigation is appropriate. This conclusion, as we have shown, could properly be implemented by a condition to withholding suspension of the interim rates.[93]

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[93] While they do not say so here, the carriers' insistence upon reparations procedures may reflect their intention to argue below that the Alaska parties lack standing or cognizable injury to obtain reparations. (Section 8 of the Act, 49 U.S.C. § 8.) *See, e.g., Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); *Louisville & Nashville R.R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); and *cf. Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). In other words, if the Commission's refund condition is struck down here, the carriers may, by asserting a lack-of-standing defense to a reparations claim, seek to avoid *any* liability to the Alaska parties stemming from excessive rates charged during the pendency of the investigation—no matter how great their actual monetary loss. While we have no doubt that the Alaska parties would have the requisite standing and injury to obtain reparations, *see, e.g., Gabbert* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 93 F.2d 562, 563 (5th Cir. 1937); *see also Arrow*, 372 U.S. at 669; *Illinois Brick Co.* v. *Illinois*, 431 U.S. at 736, the issue appears not to have been decided by either the courts or the agency on the specific facts presented here. On the other hand, there cannot be the slightest question as to the Alaska parties' right to participate in any refund to the oil producers, which would, in effect, retroactively increase the wellhead value during the period in question.

IV. THE COMMISSION'S ORDER DID NOT CONTRAVENE ANY RIGHTS OF THE CARRIERS UNDER THE FIFTH AMENDMENT.

In the proceedings below several petitioners argued that the Commission's suspension order violated their rights under the due process and just compensation clauses of the Fifth Amendment. (*E.g.*, 306a-11a, 617a-18a. *See* 761a.) Although this line of argument is not spelled out in petitioners' brief in this Court, it seems not to have been abandoned (*see* Pet. Br. 2, 3).[94] In any case, the argument need not detain the Court.

With respect to any claim that the carriers were denied due process when the Commission determined without a prior evidentiary hearing the interim rates that it would allow them to file (*see* 306a-11a, 617a), we have already shown that this action did not amount to prescribing rates and that a prior "full hearing" was thus not required (*see* pp. 55-57, *supra*). Petitioners are receiving a full hearing in the formal investigation, in which rates *will* be prescribed. Moreover, the carriers were afforded extraordinarily full procedures at the suspension stage.[95] As discussed in the Statement (pp. 10-21, *supra*), a large volume of economic data was received from both the carriers and protestants; voluminous written argument was submitted; an opportunity to present oral argument to the full Commission was pro-

[94] Petitioners thus state that this case "present[s] issues arising under the Fifth Amendment" and quote the due process and just compensation clauses (Pet. Br. 3).

[95] Section 15(7) provides that the Commission may "enter upon" its investigation "at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice" and that it may suspend a proposed rate schedule merely by "filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension."

vided; and the suggested interim rates were carefully computed, essentially on the basis of data submitted by the carriers.

Nor is there any basis for a contention that the interim rates are confiscatory (*see* 618a, 761a).[96] Those rates, as discussed above, utilized the carriers' own "basic data" and assumed the accuracy of the investment and expenses claimed by them (*see* pp. 19-21, *supra*). Further, the Commission allowed a substantially higher rate of return on valuation (*i.e.*, 10% instead of 8%) than it had utilized in prior cases involving crude oil pipelines. And the carriers' composite return on equity under the interim rates was calculated by the Commission at 23 percent. (635a.) In short, the suggested interim rates, far from being confiscatory, are likely to turn out to be (if anything) on the high side—and that, of course, is why the Commission insisted on a refund condition applicable to those rates.

[96] *See Permian Basin Area Rate Cases*, 390 U.S. 747, 768-74 (1968).

CONCLUSION

For the foregoing reasons, the Commission was empowered to issue the order under review. The judgment of the court of appeals, dismissing the petitions for review, should be affirmed.

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STATUTORY APPENDIX

STATUTORY APPENDIX

Interstate Commerce Act (49 U.S.C. §§ 1 et seq.)

PART I

Regulation in general; car service; alteration of line

Sec. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

* * * *

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; [49 U.S.C. § 1 (1) (b)].

* * * *

(3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; . . . Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 2(a), (b), 54 Stat. 899; [49 U.S.C. § 1(3) (a)].

* * * *

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge

for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this part. Feb. 4, 1887, c. 104, pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 2(d), 54 Stat. 899; Aug. 2, 1949, c. 379, § 1, 63 Stat. 485; Feb. 5, 1976, Pub. L. 94-210, Title II, § 202(a), (b), 90 Stat. 34, 35; [49 U.S.C. § 1(5)(a)].

* * * *

Liability in damages to persons injured by violation of law

Sec. 8. In case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. Feb. 4, 1887, c. 104, Pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; [49 U.S.C. § 8].

* * * *

Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

* * * *

Sec. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part,

or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property, as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. Feb. 4, 1887, c. 104, Pt. I, § 15, 24 Stat. 384; June 29, 1906, c. 3591, § 4, 34 Stat. 589; June 18, 1910, c. 309, § 12, 36 Stat. 551; Feb. 28, 1920, c. 91, § 418, 41 Stat. 484; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 10(a), 54 Stat. 911; [49 U.S.C. § 15(1)].

* * * *

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf

such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this chapter. Feb. 4, 1887, c. 104, Pt. I, § 15, 24 Stat. 384; June 18, 1910, c. 309, § 12, 36 Stat. 551; Feb. 28, 1920, c. 91, § 418, 41 Stat. 484; Mar. 4, 1927, c. 510, § 2, 44 Stat. 1447; Sept. 18, 1940, c. 722, Title I, § 10(c), 54 Stat. 912; Feb. 5, 1976, Pub. L. 94-210, Title II, § 202(e)(1), 90 Stat. 36; [49 U.S.C. § 15(7)].

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PART II

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Rates, Fares, and Charges of Common Carriers by Motor Vehicle

Sec. 216.

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(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service

thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided*, That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation on October 1, 1935. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. Feb. 4, 1887, c. 104, Pt. II, § 216, as added Aug. 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, § 16, 52 Stat. 1240; Sept. 18, 1940, c. 722, Title I, § 22(b-d), 54 Stat. 924; Aug. 24, 1962, Pub. L. 87-595, § 1, 76 Stat. 397; [49 U.S.C. § 316(g)].

* * * *

PART III

* * * *

Commission's Authority over Rates, and So Forth

Sec. 307.

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(g) Whenever there shall be filed with the Commission any schedule (except a schedule referred to in section 322) stating a new rate, fare, charge, classification, regulation, or practice for the interstate or foreign transportation of passengers or property by a common carrier or carriers by water, the Commission may upon protest of interested parties or upon its own initiative at once, and, if it so orders, without answer or other formal pleading by such carrier or carriers, but upon reasonable notice, enter upon an investigation concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice, and pending such hearing and the decision thereon, the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto, as would be proper in a proceeding instituted after such rate, fare, charge, classification, regulation, or practice had become effective. If the proceeding shall not have been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, regulation, or practice shall go into

effect at the end of such period: *Provided, however*, That this subsection shall not apply to any initial schedule filed prior to October 1, 1941, by any such carrier (other than a carrier subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended, or the Shipping Act, 1916, as amended) insofar as such schedule names rates on traffic, or for services connected therewith, as to which such carrier was in bona fide operation on January 1, 1940. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. Feb. 4, 1887, c. 104, Pt. III, § 307 as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 937; [49 U.S.C. § 907(g)].

* * * *

PART IV

* * * *

Commission's Authority over rates and practices

Sec. 406.

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*

(e) Whenever there shall be filed with the Commission, under this part, any tariff stating a new rate, charge, classification, regulation, or practice, the Commission may upon complaint or upon its own initiative at once, and, if it so orders, without answer or other formal pleading, but upon reasonable notice, enter upon an investigation concerning the lawfulness of such rate, charge, classification, regulation, or practice, and, pending such hearing and the decision thereon, the Commission, by filing with such tariff and delivering to the freight forwarder affected thereby, a statement in writing of its reasons for

such suspension, may from time to time suspend the operation of such tariff and defer the use of such rate, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after such rate, charge, classification, regulation, or practice had become effective. If the proceeding shall not have been concluded and an order made within the period of suspension, the proposed rate, charge, classification, regulation, or practice shall go into effect at the end of such period: *Provided, however*, That, subject to section 405 (b), this subsection shall not apply to any initial tariff filed prior to the expiration of ninety days after May 16, 1942. At any hearing involving a change in a rate, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the freight forwarder to show that the proposed changed rate, charge, classification, rule, regulation or practice is just and reasonable. Feb. 4, 1887, c. 104, Pt. IV, § 406, as added May 16, 1942, c. 318, § 1, 56 Stat. 288; [49 U.S.C. § 1006 (e)].

* * * *

FOR ARGUMENT

Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. and ARCO PIPE LINE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' JOINT REPLY BRIEF

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IN THE

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Petitioners,

—against—

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' JOINT REPLY BRIEF

Petitioners submit this joint brief in reply to the Brief for Respondents the State of Alaska and the Arctic Slope Regional Corporation ("Al. Br.") and the Brief for the Federal Respondents ("Fed. Br.").

INTRODUCTION

Respondents assert that this case concerns "the existence, not the exercise, of the Commission's statutory power." Fed. Br. 19. In their view, the Commission possesses absolute power to suspend any rates that may be filed and may forego the exercise of that power upon such conditions as it pleases, including the

imposition of its own rates. If the Commission may forbid the operation of a pipeline which has been authorized by Congress, however, or if it may establish interim rates for such pipeline without full hearing, and without opportunity for judicial review, then the exercise of such power raises constitutional issues. Congress did not intend to confer such power upon the Commission.

Under the legislative plan, Part I carriers retain the right to initiate their rates. *E.g., United States* v. *Chesapeake & Ohio Railway*, 426 U.S. 500, 511 (1976); *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370, 384 (1932). After such rates take effect the Commission is empowered under section 15(1) to review them and, if it finds them unreasonable after full hearing, to set them aside and prescribe other rates. It may also award reparations equal to the "full amount of damages" caused by any unlawful exaction, together with interest and attorney's fees.[1]

Section 15(7), the suspension provision enacted in 1910, concerns tariffs which have not yet gone into effect, but which are required to be filed in advance under the procedures adopted in 1906, *i.e.*, because they effect "changes . . . in rates, fares or charges." Section 6(3). Under the 1910 enactment the Commission may exercise powers identical to those granted under section 15(1) whenever such changes in rates are filed, without waiting for them to take effect; in addition, it may defer the effective date of such changes.

The purpose of suspension was to permit maintenance of the status quo pending investigation of changes. It was intended as "a careful accommodation of the various interests involved,"[2] which was fair to the carriers because it allowed

[1] See 49 U.S.C. §§ 8, 16 (1976).

[2] *United States* v. *Students Challenging Regulatory Agency Procedures* ("SCRAP I"), 412 U.S. 669, 697 (1973). *See Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade*, 412 U.S. 800, 823 (1973).

them to continue operations at rates fixed by themselves. 45 CONG. REC. 4713 (1910) (remarks of Rep. Mann).

In the instant case, however, the Commission has asserted power to suspend an oil pipeline's original rate, even though it held that maintenance of the status quo—deferral of service on the pipeline—was not in the public interest. In order to alter the status quo to suit its wishes, the Commission fixed maximum rates for the suspension period, requiring the carriers to operate on its terms or not at all. It made no attempt to comply with the statutory requirement that it fix rates only after full hearing. If the Commission's rates were fixed too low, the statutory scheme provides no way for the carriers to recoup their losses. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370, 387-88 (1932).

Respondent Alaska predicts that the Commission's interim rates will be found "on the high side" (Al. Br. 65), but we understand this as a claim that those rates would be high if applied in a subsequent period, after the pipeline had attained operation at full capacity. The Commission itself acknowledged that its rates were not calculated to permit recovery of costs incurred during the suspension period itself, since it "did not consider it suitable to use the throughput level of a short initial period, such as the suspension period," in calculating rates for such a period. 776a-777a.[3] It is uncontroverted that for the period the interim rates were in fact applicable, carriers were forced to operate at a loss. 395a, 650a-652a.

Alaska also suggests that the Commission was entitled to strike down the carriers' tariffs because they were calculated in accordance with "a 1941 consent decree in a proceeding brought by the Department of Justice under the Elkins Act" (Al. Br. 14) rather than "the Commission's past practice in oil-

[3] The Solicitor General has now conceded that petitioners should be permitted to show that the loss involved in startup operations "justifies a somewhat higher rate for early stages of the pipeline's operation." Fed. Br. 57. See Point IV, *infra*.

pipeline ratemaking," Al. Br. 13. This claim is absurd, however, as the Commission's past practice had been to accept, without suspension, pipeline rates that were calculated in accordance with the 1941 Consent Decree to which Alaska refers. The Consent Decree methodology was not discussed in the Commission cases, but it withstood challenge in this Court in 1959. *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959).[4]

Alaska now derides the treatment of interest under the Consent Decree methodology as "double dipping," apparently on the theory that it is wrong to allow the pipeline owner a return both on the portion of the pipeline that he has built with equity funds and on the portion he has built with borrowed

[4] Use of the Consent Decree methodology was also recognized in the *President's April 15, 1977 Report to Congress on the Pricing of Alaska North Slope (ANS) Crude Oil* 30-32, *reprinted in* SENATE COMM. ON ENERGY & NATURAL RESOURCES, 95TH CONG., 1ST SESS., ALASKA OIL PRICE POLICY 63-65 (Comm. Print 95-14, 1977); *Anticompetitive Impact of Oil Company Ownership of Petroleum Products Pipelines: Hearings Before the Subcomm. on Small Business Problems of the House Select Comm. on Small Business*, 92d Cong., 2d Sess. 77, 84-89, 94-95 (1972) (remarks of Commission Chairman Stafford and ICC staff). For further recognition of the method, see 684a-690a, 427a-428a, 484a-490a.

The supposed "past practice" to which Alaska refers is a latter-day distillation from two Commission cases which predate World War II and in which treatment of interest was not even mentioned. *Reduced Pipe Line Rates & Gathering Charges*, 243 I.C.C. 115 (1940); *Petroleum Rail Shippers' Ass'n* v. *Alton & Southern R.R.*, 243 I.C.C. 589 (1941). Both were discussed by the Commission in *Petroleum Products, William Brothers Pipe Line Co.*, 355 I.C.C. 479 (1976), *petition for review pending sub nom. Farmers Union Central Exchange* v. *Federal Energy Regulatory Comm'n*, No. 76-2138 (D.C. Cir.), another case in which treatment of interest was not at issue. In *Charge for Terminalling & Storage, Kenai Pipe Line*, I.C.C. Docket No. 36244, initial decision (July 9, 1976), discontinued by Div. 2 on withdrawal of protest (Oct. 19, 1976) (cited Al. Br. 13), an administrative law judge observed that "[a]s far as I have been able to determine the Commission's treatment of interest expense in pipeline cases has never been specifically addressed." *Id.* at 4.

funds. Al. Br. 13. The same argument was advanced without success in *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959). Whatever its merits in general, the argument disregards the fact that in this case the carriers' parents were forced to guarantee repayment of 100% of the loans used to build TAPS. The full costs of the pipeline are therefore at the risk of the equity owners, not the lenders, and the owners are entitled to a return on the total. 693a. Even the Commission acknowledged that "there may be merit" to the carriers' views on this point, but for purposes of suspension it resolved the issue against the carriers. 625a.

Respondents imply that any abuse of power in this case is insignificant since there is an "identity of interest" between the owners of the pipeline and the owners of the oil. Al. Br. 6. But there is no such identity. *See* Table, Pet. Br. 6 n.6. If rates are set too low, carriers which own a greater share of the pipeline than their affiliates own of oil must transport competitors' oil at bargain rates. All must transport Alaska's 12-½% of the oil at bargain rates.[5] Alaska itself has calculated that for each penny the TAPS rates are understated, the carriers and their affiliates lose $1 million annually to the State. Al. Br. 7 n.11.

As shown in our principal brief (Pet. Br.) and in the argument which follows, the Commission's order was unlawful and should be set aside.

[5] Respondents assert that it is "misleading" to describe Alaska as owner of 12½% of the oil since it "holds only a royalty interest rather than an equity interest in production." Fed. Br. 8 n. 4. We do not understand the distinction, however, since Alaska's royalty rights authorize it to take either 12½% of the oil in kind or the equivalent value in cash. *See* Pet. Br. 7 n. 8. Alaska reportedly intends to begin taking its oil in kind. *See* Wall St. Journal, Feb. 24, 1978, at 14, col. 3 (Eastern ed.) Whether the royalty is taken in cash or in kind, the economic effect on the carriers and their parents is about the same.

I. THE COMMISSION MAY NOT SUSPEND THE ORIGINAL RATES OF NEW RAILROADS AND PIPELINES.

A. A New Rate Is "New" in Relation to the Old Rate For the Same Service.

Although the starting point in every statutory construction case is "the language itself," respondents err in supposing that analysis in this case may begin and end with the term "new rate."[6] The court of appeals acknowledged that, in the context of the statute, "new" might refer only to the rates that resulted from a change in existing tariffs. 756a. The principal dictionaries agree that "new" may mean "other than the former or old." WEBSTER'S THIRD INTERNATIONAL DICTIONARY, UNABRIDGED 1522 (1971 ed.); OXFORD ENGLISH DICTIONARY 113 (1971); 6 THE CENTURY DICTIONARY AND CYCLOPEDIA 3980 (1911). Respondents argue that new "should be given its ordinary meaning" (Fed. Br. 22), but, as this Court has held, "in its ordinary acceptation, when applied to the same subject or object, [new] is the opposite of old." *Pollard v. Kibbe*, 39 U.S. [14 Pet.] 353, 364 (1840). "[O]rdinarily it is a purely relative term and is employed in contrasting the date, origin, or character of one thing with the corresponding attributes of another thing of the same kind or class." BLACK'S LAW DICTIONARY 1193 (2d ed. 1910 & 4th rev. ed. 1968). In section 15(7) the new rate for a particular service is contrasted with the old rate for that same service.[7]

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[6] See Fed. Br. 21, Al. Br. 31-32, citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

[7] Respondents argue that the original rate for a new service is itself a new rate (Fed. Br. 21), but a rate is merely an attribute of a service. It can only be old or new in relation to the service for which it is charged. If the rate is as old as the service, it is not a new rate.

B. The Changes Which May Be Suspended Under Section 15 (7) Are Those of Which Advance Notice Must Be Given Under Section 6 (3).

The foregoing definition of "new rate" is confirmed by reference to the legislative purpose and "the structure of the statute, . . . the relation, physical and logical, between its several parts." *Duparquet Co. v. Evans*, 297 U.S. 216, 218 (1936). Neither Alaska nor the federal respondents have replied to our argument that sections 6 (3) and 15 (7) are coextensive. See Pet. Br. 20-21. Respondents have acknowledged, however, that the reason for enactment of the suspension provision was to authorize the Commission to initiate a proceeding against a rate believed to be unlawful as soon as advance notice of the rate was received, without waiting for the rate to go into effect. Al. Br. 34. But the Hepburn Act, ch. 3591, § 2, 34 Stat. 584, 586 (1906), required advance notice only of a "change" in rates under section 6 (3). Commencing in 1907 the Commission had called Congress' attention to its lack of power over proposed rate changes. 21 ICC ANN. REP. 9-10 (1907); 22 ICC ANN. REP. 10-12 (1908); 23 ICC ANN. REP. 6-7 (1909). President Taft made clear that the purpose of the suspension legislation he proposed in 1910 was to authorize the Commission to commence proceedings as soon as it received notice of such a change.[8] He emphasized that the suspension power, "if granted,

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[8] 45 CONG. REC. 462 (1910), *reprinted in* H.R. REP. No. 923, 61st Cong., 2d Sess. 3-4 (1910), cited Pet. Br. 18-19. The historical commentator relied upon by respondents confirms this view. 1 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931), cited Al. Br. 35; Fed. Br. 23. Professor Sharfman notes:

> Without infringing upon the ultimate rights of the carriers to initiate rates and charges, this power enabled the Commission to enter upon the regulating process at an earlier stage than in the usual proceedings upon complaint, and thereby to prevent, at the threshhold, rate changes likely to violate the basic standards of the Act to Regulate Commerce. . . . *The old rates remained in effect till the completion of the Commission's investigation.*

Id. at 201-02 (footnotes omitted, emphasis added).

should be conferred in a very limited and restricted form." 45 CONG. REC. 462 (1910), *reprinted in* H. R. REP. No. 923, 61st Cong., 2d Sess. 4 (1910). Yet respondents claim, in effect, that the Department of Justice draftsmen chose "statutory language [which] is broader than the exigencies of 1910 and 1920." Fed. Br. 27.

To the contrary, the draftsmen carefully limited the schedules which might be suspended to those which had to be filed under section 6(3), since they authorized suspension of a schedule stating a "new . . . regulation or practice" only when it was one "affecting any rate, fare, or charge," and which therefore had to be filed under section 6(3). 49 U.S.C. § 15(7).[9]

The commencement of service on a newly constructed line does not affect existing rates. The rates for such service are established by filing under section 6(1), which imposes no

[9] In the law as enacted, Congress deleted the words "affecting any rate" from section 15(1), making clear that after full hearing the Commission could condemn "any . . . regulation or practice whatsoever," 36 Stat. 551, but Congress declined to make such a deletion from the portion of the bill which became section 15(7). *Compare* ch. 3591, §2, 34 Stat. 586. See H.R. REP. No. 923, 61st Cong., 2d Sess. 10-11 (1910). As Senator Cummins stated in explaining his opposition to such a deletion, "this [suspension provision] is in relation to filing with the Commission in order to prevent any new practice going into effect without the approval of the Commission, and of course the railways now are not compelled to file with the Commission new regulations and practices." *Hearings before the Senate Comm. on Interstate Commerce on S. 3776 and S. 5106*, 61st Cong., 2d Sess. 57 (1910).

advance notice requirement.[10] Since the statute required no advance notice of a new railroad's original rates, it must be inferred that Congress did not wish to give the Commission opportunity or authority to consider whether to suspend such rates before they went into effect.[11] The Commission has no jurisdiction to suspend after a schedule has gone into effect.[12]

[10] Commission regulations pursuant to section 6(6) call for 10 days' notice of the original rates of a newly constructed railroad or oil pipeline. 49 C.F.R. § 1300.57 (1976). This abbreviated period enables Commission staff to review the tariff for conformance with formal requirements (49 U.S.C. §§ 6(6), 6(7)), but does not contemplate protest or substantive review. Respondents note Exxon counsel's earlier statement that the Commission might suspend an initial rate, but this statement was an argumentative response to the State of Alaska's request for initiation of an investigation of TAPS rates some months prior to the filing of tariffs. The suspension power of the Commission was not an issue, and Exxon did not then have the benefit of extensive research on this issue. Exxon Pipeline Company wholly supports petitioners' position that the Commission lacks authority to suspend original rates.

[11] Congress understood that the schedules to be suspended were those filed on 30 days' notice under section 6(3). *See* S. REP. No. 355, 61st Cong., 2d Sess. 9 (1910); 45 CONG. REC. 3466 (1910) (remarks of Sen. Elkins); *id.* at 3472 (Sen. Elkins); *id.* at 4109 (Sen. Root); *id.* at 6500 (Sen. Cummins); *id.* at 6501 (Sens. Jones & Cummins); *id.* at 4711 (Rep. Mann); *id.* at 4833 (Rep. Richardson); *id.* at 5143 (Rep. Russell); *id.* at 5163 (Rep. Hardy); *On Bills Affecting Interstate Commerce: Hearings Before the Comm. on Interstate & Foreign Commerce of the House of Representatives*, 61st Cong., 2d Sess. 441 (1910) (testimony of J.C. Lincoln); *id.* at 174 (testimony of E.B. Pierce). "Any new schedule of rates filed with the commission takes thirty days to go into effect, unless its operation is suspended by the commission. It may be suspended by order of the commission for one hundred and twenty days pending investigation, thus giving a possible one hundred and fifty days before that schedule goes into effect if ordered suspended by the commission." 45 CONG. REC. 5163 (1910) (Rep. Hardy).

[12] *Rates on Lumber—Vicksburg, S. & P. Ry.*, 21 I.C.C. 16, 17 (1911); *Wickwire Steel Co.* v. *New York Cent. & Hudson River R.R.*, 27 I.C.C. 168, 169 (1913).

"New" is used in section 15 (7) in the same sense as in section 6 (3) itself, where it is provided that "the proposed changes shall be shown by printing *new schedules*, or shall be plainly indicated upon *the schedules in force*" (emphasis added). Congress confirmed the sense in which it used "new rate" when it amended section 15 (7) in 1920, using the term "the proposed change of rate, fare [or] charge" in the second sentence as synonymous with the filing of a "schedule stating a new . . . rate, fare or charge." See Pet. Br. 24-26 & n.36.[13]

Respondents argue that the 1910 legislative history "contemplates that the Commission may do what it has done here" (Fed. Br. 15), but not one of the quotations upon which they rely supports this claim.[14]

Indeed, respondents appear to concede that they can find no support for their views in the legislative history, since they assert that application of the statute should not be limited to the

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[13] While the federal respondents are willing to concede that this "authoritative gloss" point may have at least "superficial plausibility" (Fed. Br. 34), they argue that "proposed change of rate" may refer to "a change from no rate to an initial rate." Fed. Br. 35. Such a construction is so strained as not to merit serious consideration.

[14] Thus, Representative Mann did not distinguish between "a schedule 'proposing to change an existing rate' and 'a schedule stating a new rate.' " Fed. Br. 27. See Al. Br. 39. Rather, the full quotation supports our view that sections 6(3) and 15(7) are coextensive, for it shows that Representative Mann used the first phrase—"schedule . . . proposing to change an existing rate"—to summarize the full scope of what might be suspended, and then went on to enumerate the various sorts of changes referred to in the bill—"new rate or classification or regulation or practice." 45 CONG. REC. 4711 (1910). See Al. Br. 39 n.58.

Nor is there any "summary of the bill" which refers in the "disjunctive" to " 'the filing of new rates or changes in old rates.' " Fed. Br. 28. Rather, respondents have taken the latter quotation from a caption in a comparative table which sets out corresponding provisions of the Elkins and Cummins Bills. *Hearings on S. 3776 and S. 5106 Before the Senate Comm. on Interstate Commerce*, 61st Cong., 2d Sess. 15 (1910). The suspension provisions of the two bills reached the same tariff changes, but the Cummins Bill (S. 3776) described them as "schedules . . . changing an existing rate or charge." The caption, which referred to both provisions, described them as "regulating the filing of new rates or changes in old rates" and it is evident that "or" is not used in the disjunctive, but links the equivalent terms of the two bills. It is "used as a word of explanation showing the relationship between the word preceding it and the word following it. In this sense it has the meaning of, 'to-wit,' and gives to the word preceding it the same meaning as that which follows." *Bowles* v. *Weiner*, 6 F.R.D. 540, 542 (E.D. Mich. 1947). *Accord, H. & B. American Mach. Co.* v. *United States*, 11 F. Supp. 48, 53 (Ct. Cl. 1935), *petition for cert. dismissed by stipulation*, 297 U.S. 726 (1936); *Blumenthal* v. *Berkshire Life Ins. Co.*, 134 Mich. 216, 219, 96 N.W. 17, 18 (1903).

evils which Congress perceived in 1910. Fed. Br. 22, 27. The statute is limited, however, by the contemporary purpose[15] and by Congress' understanding that the enactment was "fair" because it would operate only to defer changes. 45 CONG. REC. 4713 (1910) (Rep. Mann).[16] The main purpose of suspension was to guard against "instability of rates and consequent commercial disturbance." *Advances in Rates—Western Case*, 20 I.C.C. 307, 314 (1911).[17] No such disruption occurs when service commences on a new line.

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[15] *See Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395 (1975).

[16] Respondents do not dispute the fact that Congress "linked the carrier's right to maintain an existing rate to the due process requirements of the Constitution" (Pet. Br. 22 & n.29), but emphasize that most of the discussion of this linkage occurred in debate on the Cummins amendment, which would have permitted indefinite suspension of increases. Al. Br. 37 n.57. The remarks reflected an understanding as to the general operation of the Act, however, and the Cummins amendment was defeated as too harsh to the carriers. The same concerns that led to its defeat would have impelled Congress to reject the interpretation which the Commission advocates in this case.

[17] As a representative of shipping interests explained to Congress, "We are not asking for low rates, but for stability of rates and

C. Respondents Misunderstand the Purpose and Significance of the "Initial Schedule" Provisos in Subsequent Suspension Statutes.

Respondents place principal reliance on their claim that subsequent Congresses, which enacted other regulatory statutes, must have understood language like that of section 15(7) to authorize suspension of a carrier's original rates. That claim is based on the use in such statutes of the so-called "grandfather provisos," which forbade suspension of the "initial schedule" of carriers in operation when the acts took effect.[18]

Such a claim is of dubious relevance, at best, since the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). *Accord, United Airlines, Inc. v. McMann*, 98 S. Ct. 444, 449 n.7 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); Pet. Br. 29 n.4.

The argument has no merit here, since respondents appear to have misunderstood the purpose and meaning of the grandfather provisos. The grandfather carriers' initial schedules were not necessarily composed of new rates. Those schedules would have contained both old rates, at which the carriers had been operating before they came under ICC regulation, and new rates, which the carriers might choose to adopt when they filed

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reasonable rates; rates adjusted to our competition; but stability of rates. It is the violent fluctuations that injure the shippers . . . ." *On Bills Affecting Interstate Commerce: Hearings Before the Comm. On Interstate & Foreign Commerce of the House of Representatives*, 61st Cong., 2d Sess. 440 (1910) (testimony of J.C. Lincoln).

[18] 49 U.S.C. § 316(g) (motor carriers), 318(c) (contract carriers) (originally enacted as Motor Carrier Act of 1935, ch. 498, 49 Stat. 558, 561); 49 U.S.C. § 907(g) (Transportation Act of 1940, ch. 722, Tit. II, § 201, 54 Stat. 937) (water carriers); 49 U.S.C. § 1006(e) (ch. 318, § 1, 56 Stat. 288 (1942)) ("initial tariff" of freight forwarders). See Fed. Br. 28-31; Al. Br. 40-46.

their initial schedules.[19] In enacting the grandfather exemption, Congress obviated any claim that an initial schedule could be suspended because it reflected a change from prior practice. Congress apparently recognized that the grandfather carriers would have to adapt their existing rates to the new regime (see Pet. Br. 30 n.43), and it allowed those carriers to file their rates and, indeed, to effect an adjustment of rates without threat of disruption of service.

That Congress did not equate "initial schedules" with "new rates" is conclusively demonstrated by reference to section 218(c) of the Motor Carrier Act, the provision which authorized suspension of the schedules of "contract carriers." Those schedules could be suspended only if they stated a "reduced charge." 49 Stat. 561 (present version codified in 49 U.S.C. §318(c)). The section nonetheless went on to include the identical grandfather clause on which respondents rely, immunizing "initial schedules" from suspension, and plainly giving the contract carriers an opportunity to reduce their rates before filing their initial schedules. *Id.*[20]

Respondents note that in 1938 Congress placed a time limit on the grandfather provisos and argue that thereafter all initial schedules were impliedly subject to suspension. Fed. Br. 29-30; Al. Br. 41-42. But the legislative history shows that the imposition of the time limit in 1938 was to prevent further

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[19] Nearly one hundred thousand motor carriers, subject to regulation in every state but Delaware, were brought under Commission jurisdiction in 1935. *Coordination of Motor Transportation*, 182 I.C.C. 263, 371 (1932).

[20] The principal purpose of contract carrier regulation was to ensure that they charged enough to permit the survival of the common carriers who competed with them. *See ICC* v. *J-T Transport Co.*, 368 U.S. 81, 95-96 (1961) (discussion of purpose of legislation by Frankfurter, J., dissenting).

changes which would be immunized from the suspension power. As Commissioner Eastman explained,

> all of the time our field force is discovering operators who have failed to file their applications or to file their tariffs. When they are brought to time and required to file tariffs under the law, they are now able to take advantage of the fact that all of the other carriers have filed and they can see what their rates are, and there has been a tendency in many cases to file low rates for the purpose of diverting traffic as long as such an advantage can be maintained. Being an initial tariff, we are now unable to suspend.[21]

Remarks of Senator Wheeler, sponsor of the Motor Carrier Act (79 CONG. REC. 5650 (1935)), indicate his view that suspension, even as applied to motor carriers, concerned changes in existing rates. "If [the Commission] does suspend the rate, of course, the rate the carrier has been charging will continue during that period of time. It only suspends the lower rate or the higher rate pending hearing and decision, and the carrier will still go on getting its published rate." 79 CONG. REC. 5656 (1935).[22] Accordingly, the provisos immunizing initial schedules from suspension do not justify respondents' inference that Congress believed the original rate for a new service could

[21] *Hearings on H.R. 9739 Before a Subcommittee of the House Comm. on Interstate and Foreign Commerce*, 75th Cong., 3d Sess. 25 (1938). To like effect, see *Hearings on S. 3606 Before a Subcomm. of the Senate Committee on Interstate Commerce*, 75th Cong., 3d Sess. 25 (1938); LETTER FROM THE CHAIRMAN OF THE ICC SUBMITTING A REPORT RECOMMENDING ADDITIONAL LEGISLATION ON MOTOR CARRIERS AND BROKERS, S. Doc. No. 159, 75th Cong., 3d Sess. 8-9 (1938).

[22] The sponsor's views are entitled to "substantial weight." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Nat'l Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967); *Schwegman Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

otherwise be suspended. It is undisputed that other suspension provisions, modeled on section 15(7), confer no authority to suspend a new entrant's original rates.[23]

Whether the Commission could suspend the original rates of a motor carrier, contract carrier, water carrier or freight forwarder was not an important issue because the Commission had power to consider those rates at the time it decided whether to grant a certificate of public convenience and necessity. Respondents suggest that the Interstate Commerce Commission may have no "authority to consider a carrier's initial tariff as part of certification" (Fed. Br. 32), but the relevant acts provide that the Commission may attach to its grant of a permit or certificate "such reasonable terms, conditions and limitations" as the public interest may require. 49 U.S.C. §§ 308(a), 309(b), 909(d), 909(g), 1010(e). During the debate on the Motor Carrier bill, Representative Pearson referred to that language and asked:

> Is it not a fact that under section 209 [49 U.S.C. § 309(b)] the Interstate Commerce Commission could decline to issue a certificate of public convenience and necessity unless the rates submitted by the contract carriers were satisfactory to the Commission. Could that not be done under section 209 of the bill?

79 CONG. REC. 12210 (1935). A spokesman for the committee

[23] See Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) (1976), and Section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e) (1976). The Solicitor General suggests that FERC may repudiate its predecessor agency's long standing view as to the scope of suspension (Fed. Br. 37 n.22), but the view was long ago accepted by this Court. *See Atlantic Refining Co.* v. *Public Service Comm'n of New York*, 360 U.S. 378, 388-90 (1959). Apparently as a result of statements made in *American Telephone & Telegraph Co.* v. *FCC*, 487 F.2d 865, 873 & n.15 (2d Cir. 1975), the Federal Communications Commission sought and obtained a statutory amendment establishing its right to suspend the rates of new services. Pub. L. 94-376, § 2, 90 Stat. 1080 (1976) (codified in 47 U.S.C. § 204). *See* H.R. Rep. No. 94-1315, 94 Cong., 2d Sess., at 6-7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 1926, 1931 (1976).

which reported the bill, Representative Terry, replied in the affirmative. *Id.* The Court has confirmed that, in licensing contract carriers under the Motor Carrier Act, "the matter of rates is one factor to be weighed in determining the need for the new service." *ICC v. J-T Transport Co.*, 368 U.S. 81, 91 (1961). The Solicitor General acknowledges that "rates are considered at the time of certification" in at least one class of motor carrier cases (Fed. Br. 32 n.19), and there can be no doubt of the Commission's power in this regard, though it may be sparingly exercised in practice.[24]

[24] While it is true, as respondents emphasize (Fed. Br. 32 & n.19; Al. Br. 47 n.69), that the Commission does not affirmatively "approve" a motor carrier's rates when it issues a certificate, the withholding of a certificate may mean that the Commission has disapproved the rates. Alaska asserts that "[u]nder Commission practice a carrier has ninety days *after* a certificate is granted within which to file its proposed initial tariffs" (*id.*), but we believe this to be a misstatement. An applicant who is successful in the initial licensing procedure does not receive the statutory certificate, but is given a 90 day period in which to fulfill various conditions established by the Commission, one of which is that his schedule of rates be placed on file. When the rates are filed, the Commission's rate section approves or rejects the schedule as to form. 49 U.S.C. § 317(a). The Commission may also, in an appropriate case, disapprove the rates themselves, in which case the rates are rejected ("suspended") and the certificate is also withheld. Accordingly, the Commission appears to use concurrent licensing and suspension power when it disapproves the rates of a new carrier. The affidavit of the Commission's Albert H. Fitzgerald appears to confirm that a certificate is granted only after the Commission has tacitly approved the rates by failing to "suspend" them. 715a-716a (references to "suspensions" of "initial rates for authority *to be granted*" (emphasis added)). The Commission also has power to "suspend" a motor carrier's certificate. 49 U.S.C. § 312 (1976).

Since the subsequent suspension statutes were coupled with a broad licensing power, their interpretation sheds no light on the 1910 enactment.[25]

D. Commission Practice Does Not Support Respondents' Construction of the Statute.

Although respondents do not contend that the Commission has ever suspended the original rates of a new railroad or pipeline before entry of its order in this case, they argue that "[t]he Commission has repeatedly interpreted its suspension authority . . . as extending to initial rates." Al. Br. 48. Here again, however, respondents confuse the categories at issue. In Commission terminology, the terms "initial schedule" and "initial rate" refer to the initial filing with the Commission of a rate for a particular service. Such a rate may be the original rate for a somewhat novel service which is itself subject to suspension because it establishes a practice which affects existing rates for related services; or it may be an old rate at which a particular service was performed before any schedule was on file; or a new, increased rate for an old service for which no separate schedule had been on file, as in *Cotton from New Orleans*, 49 I.C.C. 751 (1918), cited Fed. Br. 42; Al. Br. 48-49.[26]

[25] Respondents also overlook the fact that, following enactment of the Motor Carrier Act, the subsequent suspension statutes defined the schedules which might be suspended somewhat more broadly than Congress had done in 1910, by permitting suspension of any schedule stating "a new . . . practice" whether or not it affected an existing rate. 49 U.S.C. § 907(g) (water carriers); 49 U.S.C. § 1006(e) (freight forwarders). In 1940, in the case of contract carriers, Congress explicitly authorized suspension of a "charge for a new service." 49 U.S.C. § 318(c) (ch. 722, Tit. I, § 23, 54 Stat. 925 (1940)).

[26] In *Cotton from New Orleans*, the carrier had failed to file its port-to-port rate for the all-water journey from New Orleans to New York, although the rates for through transport by rail and water from inland points via New Orleans to New York had long been on file. *See Southern Pacific Co. Ownership of Atlantic Steamship Lines*, 43

The results in the Commission cases are consistent with the view that such an initial filing may be suspended under section 15 (7) only if it changes or affects existing rates. *See Rail-Water, Grain in Bulk, Missouri, Illinois & Indiana to Buffalo,* 319 I.C.C. 123, 129, *rev'd as to burden of proof,* 321 I.C.C. 564 (1963) ("The proposed rates are 'initial' in the sense that joint rates for the service have not heretofore been published, but they are 'changed' in the sense that existing charges to shippers for the service are changed.")

Apart from *Cotton from New Orleans,* which concerned an increased rate for an old but previously unfiled service, the Commission's power to suspend was not in issue and was not discussed in the subsequent cases on which respondents rely. The question instead was whether the carrier had the burden of proving the reasonableness of his proposed rate or practice in the subsequent investigation and hearing.[27]

In all three of the section 15 (7) cases upon which respondents rely, the Commission appears to have exercised authority to suspend an initial filing because it changed pre-

I.C.C. 168, 179 (1917). When the Commission ordered the carrier to file the port-to-port rates, the carrier took the occasion to increase all the rates, and the Commission suspended. The Commission noted that the port-to-port rates were "new rates in the sense that respondent had not previously filed its port-to-port rates with the Commission," 49 I.C.C. at 752, but they were also new, increased rates for an old service, and there could be no doubt of the Commission's authority to suspend.

[27] As enacted in 1910, section 15(7) imposed on the carrier the burden of proving the reasonableness of an "increased rate" in an investigation, but the Commission limited this to an increase in rates previously on file. This in effect relieved the carrier of the burden of proving the reasonableness of its initial filing in respect of a particular service, even if it reflected an increase, as in *Cotton From New Orleans, supra.* In the Transportation Act of 1940 Congress amended the statute to impose the burden of proof on the carrier in respect of any "proposed changed rate, fare, charge, classification, rule, regulation or practice." Transportation Act of 1940, ch. 722, § 10(c), 54 Stat. 912.

viously unfiled rates[28] or because it inaugurated a new practice — a somewhat novel service—which affected the rates for existing services.[29] The cases under the Motor Carrier Act are not relevant because the Commission had concurrent power to withhold a certificate at the same time that it "suspended" the rates.[30] Since the basis for suspension is not discussed in these cases, the Commission's action in suspending is no more than the "unexplained exercise of supposed authority," which is entitled to no weight. *Adamo Wrecking Co. v. United States,* 98 S. Ct. 566, 574 n.5 (1978).

The agency's interpretation "carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings". *Zuber v. Allen,* 396 U. S. 168, 192 (1969).[31] The interpretation which

The Commission, however, has continued to relieve the carrier from the burden of proving the reasonableness of its initial filings for new services, even though it is apparent that the Commission has power to suspend those filings under section 15(7) only because they change or affect the rates for existing services. Commission interpretation of the burden of proof requirement furnishes no guidance in the present context. An equitable decision to relieve carriers from such a burden in respect to initial filings may not be translated, by reverse alchemy, into the conclusion that all initial filings may be suspended.

[28] *Cotton from New Orleans, supra.*

[29] *Rail-Water, Grain in Bulk, Missouri, Illinois & Indiana to Buffalo,* 321 I.C.C. 564, *reversing* 319 I.C.C. 123 (1963) (carriers with prior separate tariffs filed joint "initial tariff" stating lower rates for new combined service over same route); *Bituminous Coal Via Motor-Rail from Lynnville, Ind., to Chicago, Ill.,* 313 I.C.C. 573 (1961) (established carriers filed "initial" joint rate for through transport of coal) (suspension under §§ 15(7), 216(g)).

[30] See the remaining Commission motor carrier cases cited Fed. Br. 43 n. 28; Al. Br. 51 & n. 74.

[31] Generally, the agency's interpretation is entitled to deference only when it is contemporaneous with enactment of the statute,

Chairman Knapp advanced to Congress in 1910 was that suspension would not deny the carriers their right to initiate rates since "[t]hey had a rate before they filed the new tariff."[32] Commissioner Clements also expressed the view that suspension "is simply holding that rate then made in statu quo, and when they ask to increase it asking the reason for it." *Id.* at 1271, quoted Pet. Br. 26 n.37. The Commission described the scope of the law in its Annual Report for 1911, noting that

> [o]ne of the important additions by the Mann-Elkins Act of 1910 is the authority conferred upon the commission to suspend the operation of proposed changes in rate schedules until the propriety and reasonableness thereof may be investigated.

25 I.C.C. ANN. REP. (1911). *See* 24 I.C.C. ANN. REP. 1 (1910). The Commission's regulations also reflect this traditional view.[33]

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longstanding and consistent with the congressional purpose. *See, e.g., Batterton v. Francis,* 97 S. Ct. 2399, 2405 & n. 9 (1977); *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-42 (1976); *Morton v. Ruiz,* 415 U.S. 199, 237 (1974); *FMC v. Seatrain Lines, Inc.,* 411 U.S. 726, 745-46 (1973); *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

[32] *On Bills Affecting Interstate Commerce: Hearings Before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d Sess. 1211 (1910), quoted Pet. Br. 21.

[33] Respondents avoid discussion of regulations as indicia of Commission construction. See Pet. Br. 27. Those which use the term "new" to distinguish a rate, tariff, practice or other item from those which they replace include 49 C.F.R. §§ 1300.9(k)(9)(1976) ("new tariff . . . prior tariff"); 1300.54 ("new rates" synonymous with "change in rates"); 1300.9(h)(1) ("new tariff . . . former tariff" and "new tariff . . . old tariff"). *See also* 49 C.F.R. §§ 1300.9(i), 1300.22, 1300.31(c)(8). In contrast, when the Commission addresses rates or items which are not changes or replacements it chooses instead such terms as "original" (49 C.F.R. §§ 1300.9(k)(10), 1300.11) or "established in the first instance" (§ 1300.57). *See* 49 C.F.R. § 1303.26(b) ("first fare"). *See also* 49 C.F.R. § 1300.9(k)(1) ("the schedules which were to be changed by the suspended publication . . . will remain in effect and will not be changed so long as the effectiveness of the suspended matter is deferred").

II. EVEN WHERE THE COMMISSION MAY SUSPEND A RATE, IT MAY NOT SUSPEND FOR UNLAWFUL PURPOSES.

The suspension power may only be exercised in accordance with the statutory purpose to maintain the status quo of transportation pending an investigation.[34] If the Commission may suspend a new line's original rate, it may only do so upon a finding that it is preferable in the public interest to defer the commencement of service on the new line, rather than to allow service to commence at the carrier's original rates. Pet. Br. 32-33.

Respondents argue that, despite the legislative history, the 1910 enactment must authorize suspension for other reasons than to preserve the status quo, since "[t]hat is exactly what Congress intended when it provided for the suspension of 'new' rates—including initial rates—filed by motor carriers, water carriers and freight forwarders." Al. Br. 43; see Fed. Br. 40-41. We have already shown, however, that respondents misunderstood the relevant provisions of those other statutes. In contrast to a licensing decision under those other enactments, suspension under section 15(7) presents a narrow issue—whether to preserve the status quo pending investigation.[35]

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[34] *On Bills Affecting Interstate Commerce: Hearings Before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d. Sess. 1271 (1910) (Commissioner Clements). *See* Pet. Br. 32-33 & n.48.

[35] The Court has compared a rate suspension to a preliminary injunction (*United States* v. *Chesapeake & Ohio Ry.,* 426 U.S. 500, 513 (1976)), and it is black-letter law that the purpose of such an injunction is to preserve the status quo. *E.g., District 50, UMW* v. *International Union, UMW,* 412 F.2d 165, 168 (D.C. Cir. 1969); *American Radio Ass'n* v. *Mobile Steamship Ass'n,* 483 F.2d. 1, 4 (5th Cir. 1973); *Tanner Motor Livery, Ltd.* v. *Avis, Inc.,* 316 F.2d 804, 808-09 (9th Cir.), *cert. denied,* 375 U.S. 821 (1963); *Blaylock* v. *Cheker Oil Co.,* 547 F.2d. 962, 965 (6th Cir. 1976). As respondents recognize, however (Fed. Br. 55), the Commission's suspension

Suspensions which are "aimed at coercing behavior rather than merely preserving the status quo pending investigation" are a "sham" and constitute an abuse of authority.[36] In the instant case the Commission held that maintenance of the status quo was *not* in the public interest, that it would be "contrary to the interests of all concerned" to defer the commencement of service on the Trans Alaska Pipeline.[37] 629a. But it suspended the original rates anyway, in the belief that it could thereby alter the status quo and compel the carriers to supply service during the suspension period at a rate initiated by the Commission.

The suggestion that, upon suspension, carriers may yield to coercion by refiling tariffs with rates as dictated by the Commission, cannot make an otherwise unlawful suspension proper. Fed. Br. 41. The validity of a suspension order depends upon the propriety of the Commission's actions, not upon any subsequent acts of the carriers. If the Commission may suspend an original rate, it may do so only for the purposes authorized by Congress. *E.g., Local 357, International Brotherhood of*

power is narrower than the injunctive power of the Judiciary. Congress authorized suspension only as "an emergency measure to preserve the *status quo.*" *Vulcan Detinning Co.* v. *New York Central R.R.*, 203 I.C.C. 260, 261 (1934).

[36] *Continental Airlines, Inc.* v. *Civil Aeronautics Board*, 522 F.2d 122, 129 (D.C. Cir. 1975) (*en banc*); *see Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 543 F.2d 247 (D.C. Cir. 1976).

[37] No one disputes the validity of that Commission conclusion. Preservation of the status quo would have imposed tremendous losses on the TAPS carriers and on shippers, as well as some loss to the State of Alaska (through deferral of tax revenues and royalties) and the Arctic Slope Regional Corporation (through deferral of its share of the State's revenues). And Congress has declared that "[t]he earliest possible construction" of TAPS and "early delivery of oil and gas from Alaska's North Slope" is in "the national interest." 43 U.S.C. § 1651 (1976) *See* Pet. Br. 5.

Teamsters v. NLRB, 365 U.S. 667, 676-77 (1961). Since the agency exercised its power for an unlawful purpose, its suspension order must be set aside.[38]

III. THE COMMISSION UNLAWFULLY PRESCRIBED INTERIM RATES WITHOUT A FULL HEARING.

Respondents' assertion that the Commission did not unlawfully prescribe rates (Al. Br. 53-54; Fed. Br. 45-46) cannot withstand even cursory examination. As the respondents concede (Al. Br. 18; Fed. Br. 48), the Act specifically empowers the Commission to set rates only after a full hearing, upon a finding that the rates established by the carrier are "unjust or unreasonable . . . or otherwise in violation of [the Act]." 49 U.S.C. § 15(1); 49 C.F.R. § 1300.56 (1976).

The Commission's order under review is a ratemaking order. Respondents' argument to the contrary rests on their contention that because, in theory, the Commission gave the carriers a choice between charging the specified rates or declining to operate at all, its order was mere advice. That argument ignores the nature of Commission regulation over oil pipelines. An oil pipeline faced with a Commission ratemaking order always has the choice of charging the rate specified by the

[38] Respondents concede that a suspension decision is reviewable to determine whether the Commission exceeded its statutory authority. Al. Br. 31; Fed. Br. 19 n.11. *See Phillips Petroleum Co.* v. *Federal Power Commision*, 227 F.2d 470 (10th Cir. 1955). Whatever may be the standard of review when the Commission has purported to apply the statutory criteria, nothing in this Court's decisions in *United States* v. *Students Challenging Regulatory Agency Procedures* ("SCRAP I"), 412 U.S. 669 (1973), or *Arrow Transportation Co.* v. *Southern Railway*, 372 U.S. 658 (1963), precludes review when the agency does not even purport to apply the statutory test of preservation of the status quo. *See Leedom* v. *Kyne*, 358 U.S. 184 (1958). *See also* Pet. Br. 34 n.50.

Commission or declining to operate.[39] The existence of this "option" does not make the Commission's order any less a ratemaking order in legal effect, in purpose or in economic reality.

Respondents do not, and indeed cannot, suggest that the hearing prerequisites imposed by the Act have been satisfied in this case. Rather, respondents seek to justify the Commission's action as a beneficent gesture, affording the carriers an alternative to other proposed courses: (1) an outright seven-month bar to any operations or (2) repetitive filings designed to find a rate that the Commission would approve. Petitioners agree that neither of those alternatives presented acceptable options. As the rates here involved a newly constructed pipeline, the carriers did not have the usual protection of existing rates during the suspension period. The cessation of pipeline operations for the suspension period would have caused irreparable injury to all concerned. Cancellation of the carriers' original schedules and filing of new schedules, the only alternative under the Commission's rules,[40] would require the carriers to waive their right to secure a hearing with respect to the reasonableness of the rates originally filed.

The Commission's action ignores the central philosophy underlying section 15(1), which establishes that carriers are entitled to rates of their own making or rates set by the

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[39] Section 1a of the Interstate Commerce Act requires prior approval only when a "carrier by railroad" seeks to discontinue its operations. 49 U.S.C. § 1a. Unlike a railroad or public utility, an oil pipeline is always free to cease operation. No prior government permission or abandonment application is required. This Court held at an early date that ". . . while the amendment [subjecting pipelines to the Interstate Commerce Act] does not compel them to continue in operation . . . it does require them not to continue except as common carriers." *United States v. Ohio Oil Co.*, 234 U.S. 548, 560 (1914).

[40] See 49 C.F.R. § 1300.11 (1976), ICC Special Permission No. 76-2730 (February 13, 1976).

Commission in accordance with the statutory prerequisites. That philosophy has been explicitly and repeatedly recognized by this Court. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370, 384 (1932); *Atchison, Topeka & Santa Fe Railway v. United States*, 284 U.S. 248, 262 (1932); *Interstate Commerce Commission v. Louisville & Nashville Railroad*, 277 U.S. 88, 93 (1913). As the Court of Appeals stated in *Arizona Grocery*, 49 F.2d 563, 566 (9th Cir. 1931), *aff'd*, 284 U.S. 370 (1932):

> The statute does not authorize or suggest the imposition of tentative rates pending an investigation or of rates *pendente lite* in an investigation.

Thus, the question is not merely whether carriers may be forced to operate at rates other than those they would "prefer" (Al. Br. 54, n. 77), but whether they are entitled to operate under rates established in accordance with the Act.

Like the majority below, respondents seek to avoid the statute through reliance upon the Court's decision in *United States v. Chesapeake & Ohio Railway ("Chessie")*, 426 U.S. 500 (1976). Specifically, respondents claim that the Commission's prescription of rates here is analogous to the Commission's action in *Chessie*, where the railroads were required to devote a portion of the increased revenues sought to the particular purpose which the railroads contended justified the rate increase. 426 U.S. at 515. See Al. Br. 55-56; Fed. Br. 47-49.

The attempt of respondents and the court below to extend the limited holding of the *Chessie* decision beyond its clear meaning should be flatly rejected. This Court confined *Chessie* to the specific question before it (426 U.S. at 509-10):

> The precise question presented in this case, while one of first impression in this Court, is also a narrow one . . . . We are confronted with the question of whether the Commission may, as a condition for not suspending and subsequently investigating the

> lawfulness of a proposed tariff, require the railroads to devote the additional revenues to a need which, they allege, justifies the increase.[41]

The *Chessie* case did not involve the Commission's authority to prescribe *rates* without a full hearing. This Court held only that the requirement that a carrier use revenues from increased rates for the very purposes advanced by the carrier to justify those rates was "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend [increased] rates." 426 U.S. at 514. The attempt to apply that holding to the Commission's statutorily-prohibited prescription of interim rates in this proceeding carries the *Chessie* decision far beyond its carefully defined boundaries.

Similarly, respondents' interpretation of *Chessie* as overruling *Moss v. Civil Aeronautics Board*, 430 F.2d 891 (D.C. Cir. 1970) (Fed. Br. 49), must be rejected. In *Moss* as in this proceeding, a regulatory commission, after oral argument, (1) suspended the rates proposed by carriers, (2) outlined its own rate formula and (3) announced its decision to "permit tariff filings implementing" that formula to take effect without suspension. 430 F.2d at 894-95. The Court of Appeals for the

[41] The *Chessie* case did not raise any issue with respect to the Commission's power to suspend the increased rates involved in that proceeding. The parties in *Chessie*, including the Interstate Commerce Commission, presented the issue in very narrow terms: "whether the Commission has the power to issue such orders [simply holding the railroads to their word], as a condition of not suspending proposed rate increases"; "The Commission has not asserted a broad power over management decisions; the decision regarding why and for what purpose additional funds are required was made by the railroads themselves. It has simply held the railroads to their word." Brief for Appellants United States and Interstate Commerce Commission, Case No. 75-420, filed January 7, 1976, at 2, 40.

District of Columbia Circuit disagreed with the agency's contention that it had only "suggested" rates, concluding that

> [a]s a practical matter, the Board's order amounted to a prescription of rates because, as the Board admits, the pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistible.
> *Id.* at 898.

The controlling factor in *Moss* was not that *ex parte* meetings had taken place between the agency and the regulated industry (Al. Br. 57; Fed. Br. 49), but that an agency had attempted to prescribe rates without the requisite full hearing, and to use its suspension authority to shield its prescription from the judicial review provided by Congress. *See Continental Air Lines, Inc. v. Civil Aeronautics Board*, 522 F.2d 107, *vacated and reinstated in part on rehearing en banc*, 522 F.2d 122 (D.C. Cir. 1975).[42]

[42] Although the court *en banc* decided it need not have reached the issue, we believe the original panel in *Continental Air Lines* was sound in its interpretation of *Moss*. As the panel makes clear, the principles underlying *Moss* are unmistakably applicable here:

> [T]he Board orders challenged here are not a legitimate exercise of its discretionary suspension power. Here, the Board through selective application of its suspension authority attempted to coerce petitioner to conform to its preferences as to aircraft accommodations.
>
> The suspension order, therefore, is a sham, designed to implement a policy and assertion of authority outside the Board's statutory power. The Board cannot be allowed to cloak actions outside its authority in the guise of suspension orders and thus insulate them from judicial review and control. To shield such orders from review would allow the Board to "become a monster which rules with no practical limits on its discretion" .... Hence this case is similar to *Moss* v. *CAB, supra*, where we held that a suspension order, which in reality established rates without the proper procedures was subject to review. 522 F.2d at 121 (citations omitted).

It is inconceivable that this Court intended *sub silentio* to repudiate the sound principles underlying *Moss* when it decided *Chessie*.

The coercive economic effect of the Commission's order is beyond dispute.[43] It is obvious that the Commission's action was intended to force the carriers to file the specified interim rates, and that the Commission expected the carriers to do so. The Commission would not have suspended the filed rates if it had thought there was a likelihood that no interim rates would be filed and that the pipeline would be shut down. As Judge Roney said in the dissent below:

> This is ratemaking. We should not hide from that fact . . . . The Court, the Commission, the pipeline companies, and all parties to this proceeding know that an interim rate will have to be accepted by the [pipeline companies].
> 762a, 557 F.2d at 802.

Since the Commission's ratemaking order prescribing interim rates was entered without the full hearing required by section 15(1), it was unlawful.

IV. THE REFUND CONDITION IMPOSED BY THE COMMISSION IS UNLAWFUL.

Petitioners contend that they are entitled to have their liability to repay shippers for any charges ultimately found to be excessive determined under the statutory standard for reparations. In responding to petitioners' arguments regarding the legality of the refund provision, the federal respondents have conceded that the refund provision adopted by the

[43] In contrast, the Commission's order in *Chessie* was not coercive since it merely required a modification of the tariff to include a commitment the carriers had already made in their tariff applications. Thus, the carriers were only required to formalize a decision which they had already made concerning use of the funds collected under the tariff.

Commission is materially different from the reparations standard. Fed. Br. 56. The refund condition, by its terms, measures the liability imposed on the carriers as the difference between the filed rate and the rate ultimately approved by the Commission for the future; reparations are measured by the damages incurred by the shipper, *i.e.*, the differences between the rate collected and a just and reasonable rate at the time of shipment. With respect to the suspension period in this case, this difference may be substantial.[44]

Apparently believing that use of an unlawful standard threatened the validity of the refund provision, the Federal respondents state that the refund obligation imposed by the Commission will be interpreted so that refunds need not be calculated solely by reference to the rate ultimately prescribed for the future. Rather, they now suggest that, upon a proper showing by petitioners, any obligation may be calculated by reference to the "possibly different rate level that may have been just and reasonable during the present stages of the pipeline operation." Fed. Br. 56.[45]

This concession, assuming it is binding upon the federal respondents, does not remedy the fundamental objection to the Commission's action.[46] Section 15(7) expressly limits the au-

[44] On denial of rehearing, three dissenting Commissioners expressed the view that "[i]n light of circumstances" related to the start-up costs of the pipeline, the carriers "should be allowed an increase of 42 cents per barrel in the interim levels." 781a.

[45] By adopting this interpretation of the refund provision, the federal respondents necessarily imply that petitioners will have an appropriate forum in which to make such a showing. It is unclear, however, whether respondents are contending that the burden of proof would shift to petitioners under respondents' theory. Such a shift of the burden of proof would deprive petitioners of their statutory rights.

[46] The federal respondents' concession that higher rates might have been justified during the early operating period has come too late to remedy any loss suffered by the carriers from Aug. 1 through Oct. 20, 1978, when the Commission's interim rates were in effect.

thority to order refunds to "a proposed *increased* rate or charge" (emphasis added). Therefore, *any* refund provision imposed with respect to original or reduced, interim tariffs, regardless of content, is unlawful. The Commission itself recognized this statutory limitation and expressed doubts as to the propriety of its action, but proceeded nonetheless to order refunds. Pet. Br. 43. Similar doubts were expressed by the court of appeals, although it upheld the Commission's action. *Id.* To prevent further expansion of powers expressly limited by Congress, this Court must establish that such action, taken in contravention of the statute, will not be sustained. Eleventh-hour speculative concessions should not be allowed to obscure the fact that, by ordering refunds in this case, the Commission exceeded its statutory authority.

CONCLUSION

For the reasons set forth above and in our principal brief, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed and the order of the Interstate Commerce Commission should be set aside.

Respectfully submitted,

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